TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: October 23, 2013

DATE OF REQUEST: October 4, 2013

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2013-1342-RUL. Consideration for publication of, and hearing on, proposed new and amended Sections of 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Chapter 101, General Air Quality Rules; Chapter 106, Permits by Rule; Chapter 116, Control of Air Pollution by Permits for New Construction or Modification; and Chapter 122, Federal Operating Permits Program and corresponding revisions to the State Implementation Plan (SIP). New and amended Sections 39.411(e)(11), (15) and (16), and (f)(4) and (8), 39.412(a) - (d), 39.419(e)(1), 39.420(e)(4), 101.1, 101.10, 101.201, 106.2, 106.4, 116.12, 116.111, 116.160, 116.164, 116.169, 116.610, 116.611, and 122.122 would be submitted to the United States Environmental Protection Agency as revisions to the SIP.

The proposed rulemaking implements House Bill 788, 83rd Legislature, 2013, Regular Session, which requires that the commission adopt rules for the authorization of emissions of greenhouse gases (GHGs) to the extent required under federal law. The proposed rules establish GHGs thresholds for Title V and Prevention of Significant Deterioration (PSD) permits, clarify how emissions of GHGs are implemented in the emissions inventory and emissions fee rules, specify the PSD GHG permit applications are not subject to requirements regarding a contested case hearing, and specify that GHGs do not have a reportable quantity (RQ) for emissions event reporting purposes. The proposed rules also address a rulemaking petition from 3M Company to establish an RQ of 5,000 pounds for C6 Fluoroketone, a fire protection fluid. (Tasha Burns, John Minter) (Rule Project No. 2013-040-116-AI)

Steve Hagle, P.E.
Deputy Director

Michael Wilson, P.E.
Division Director

Charlotte Horn
Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** October 4, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-1342-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 39, Public Notice
Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment
Chapter 101, General Air Quality Rules
Chapter 106, Permits by Rule
Chapter 116, Control of Air Pollution by Permits for New Construction or Modification
Chapter 122, Federal Operating Permits Program

House Bill 788 – Greenhouse Gas Permitting
Rule Project No. 2013-040-116-AI

Background and reason(s) for the rulemaking:
In recent years, regulations promulgated by the United States Environmental Protection Agency (EPA) have subjected major sources of greenhouse gases (GHGs) to permitting requirements under the Prevention of Significant Deterioration (PSD) program and the Federal Operating Permits ('Title V') Program. In 2010, EPA imposed a Federal Implementation Plan (FIP) on the state of Texas in order to issue PSD permits to major sources of GHGs. As a result, major sources of GHGs in Texas must currently file an application with EPA to obtain PSD authorization to construct or modify a major source of GHGs. If the source is also major for emissions of non-GHGs, an application must also be filed with TCEQ for a PSD permit authorizing the emissions of non-GHGs. Industry sources have indicated this dual permitting authority has resulted in significant costs and long wait times for issuance of PSD permits for GHGs. In addition, major sources of GHGs must apply for Title V permits; however, current TCEQ rules do not include GHGs as an "air pollutant" under the Title V program.

In order to resolve the issues with PSD GHG permit processing time and Title V applicability, House Bill (HB) 788, 83rd Legislature, 2013, found that the TCEQ is the preferred permitting authority for emissions of GHGs, and made corresponding changes to the Texas Clean Air Act (Texas Health and Safety Code (THSC), Chapter 382) to provide TCEQ with the express authority to permit GHGs to the extent required under federal law. New THSC §382.05102 requires that TCEQ adopt rules to allow for the authorization of emissions of GHGs, and defines the six compounds or classes of compounds which are considered GHGs. THSC §382.05102 also directs the commission to submit the newly

adopted rules to EPA for approval into the Texas state implementation plan (SIP), including procedures for transitioning any PSD GHG applications pending at EPA to the TCEQ. The GHGs permits authorized by this new section are not subject to contested case hearing requirements.

This rulemaking also addresses a petition from 3M Company filed on April 1, 2013, Docket No. 2013-0700-RUL, requesting that a particular fire protection fluid be provided a reportable quantity (RQ) of 5,000 pounds instead of the default RQ of 100 pounds. The petition was approved at the May 22, 2013, commission agenda.

Scope of the rulemaking:
As HB 788 has broad ramifications, changes are necessary to Chapters 39, 55, 101, 106, 116, and 122 in order to address requirements for permitting, contested case hearings, and public notice associated with the authorization of GHGs. The most significant rule changes are described further.

A.) Summary of what the rulemaking will do:

Chapter 116

- Changes to relevant definitions in §116.12 establish that GHGs are a "federally regulated new source review pollutant," and define how "carbon dioxide equivalent (CO2e) emissions" are determined.

- New §116.164 establishes the GHGs major source and major modification threshold levels at which a source would require a PSD permit.

- New §116.169 establishes procedures for the transition of GHG PSD permit applications from EPA to TCEQ.

- Changes to §116.610 to establish that a standard permit may be used in conjunction with a PSD GHG permit as long as the non-GHGs pollutants meet the conditions of the standard permit.

Chapter 122

- Changes to the §122.10 definition of "air pollutant" and "major source" would make sites with emissions of GHGs exceeding federal threshold levels subject to the requirement to obtain a Title V Federal Operating Permit.

- Changes to §122.122 provide a method for sources to certify enforceable emission limits for GHGs. Since the pollutant GHGs is being added to the Title V (and PSD) permitting program, existing sources may have the potential to emit over the major source thresholds, but actual emissions may be below the thresholds. These sources will have 90 days after EPA's final action approving amendments to §122.122 to

certify emissions of GHGs in order to avoid applicability of Title V permitting. New sources of GHGs would be required to certify emissions no later than the date of operation.

Chapter 106

- Changes to §§106.2 and 106.4 specify that Chapter 106, Permits by Rule, does not authorize or limit emissions of GHGs.

- Changes to §106.4 to establish that a PBR may be used in conjunction with a PSD GHG permit as long as the non-GHGs pollutants meet the conditions of the PBR.

Chapter 101

- A definition of "greenhouse gases" has been added under §101.1.

- The §101.1 definition of "reportable quantity" has been amended to specify that there is no RQ for any individual GHG or the aggregate six GHGs except for specific individual air contaminant compounds previously included in the definition of RQ. Emissions of GHGs will not be reported under Subchapter F: Emissions Events and Schedule Maintenance, Startup, and Shutdown Activities.

- Changes to §101.10 to exempt emissions of GHGs from counting towards the emissions inventory (EI) applicability requirement for sources that emit or have the potential to emit 100 tons per year or more of any contaminant, in order to be consistent with the federally tailored thresholds for GHGs; and to exempt GHGs from being required to be reported on EI.

- Changes to §101.27 to exempt the pollutant GHGs from the term "regulated pollutant" to establish that there would be no fees on emissions of GHGs.

Chapter 55

- Changes to §55.201 ensure that applications for a PSD GHG permit are not subject to contested case hearing requirements. A notice and comment hearing process will apply.

Chapter 39

- Changes to §39.411 ensure that the public notice text for PSD GHG permits correctly indicates that a person may request a notice and comment hearing for PSD GHG permits (as opposed to a contested case hearing).
- New §39.412 establishes public notice procedures for certain PSD GHG permit applications previously submitted to EPA.

B.) Scope required by federal regulations or state statutes:
40 Code of Federal Regulations (CFR) §51.166 and §52.21, are the rules governing the preconstruction authorization PSD (Federal Clean Air Act (FCAA) Title I, Part C) program, applicable to major sources and major modifications of regulated new source review (NSR) pollutants. The federal Tailoring Rule amended §51.166 and §52.21 to establish specific applicability thresholds for emissions of GHGs.

40 CFR Part 70 contains the rules for operating permit programs that are implemented by the states, as required by Title V of the FCAA. State operating permit programs are approved by the EPA. The Tailoring Rule amended Part 70 to require major sources of GHGs (as determined under the tailored thresholds) to obtain, revise, or renew their operating permit to include GHGs-specific applicable requirements.

THSC, §382.051, establishes the permitting authority of the commission. The commission may issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and to operate a federal source. This section also gives the commission authority to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under Chapter 382.

THSC, §382.05102, establishes the commission's authority to adopt rules to issue permits for GHG emissions, to the extent these emissions require authorization under federal law. These permit processes are not subject to contested case hearing under Chapter 382, THSC, Chapter 5, Texas Water Code or Texas Government Code, Chapter 2001. The section also directs the commission to submit the adopted rules to EPA for approval into the Texas SIP, and to develop rules specifying the procedures for transitioning applications pending at EPA to the TCEQ for review and issuance. The section also specifies that the commission will repeal the GHGs permitting rules if emissions of GHGs are no longer required to be authorized under federal law.

C.) Additional staff recommendations that are not required by federal rule or state statute:

- In response to a petition for rulemaking, a proposed change to the §101.1 definition of "reportable quantity" would assign an RQ value of 5,000 pounds to a firefighting compound (C6 Fluoroketone), instead of the default value of 100 pounds.

Statutory authority:
State Authority: THSC Chapter 382 (Texas Clean Air Act), §382.011, General Powers and Duties; THSC, §382.012; State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.05102, Permitting Authority of Commission; Greenhouse Gas Emissions; THSC, §382.054, Federal Operating Permit; THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing; THSC, §382.0518, Preconstruction Permit; THSC, §382.0621 Operating Permit Fee; TWC §5.102, General Powers, and TWC, §5.103 Rules.

Docket No. 2013-1342-RUL

FCAA §110(a)(2)(C); §165(a); §§501 - 505.

Effect on the:

A.) Regulated community:
Approval by EPA of these rules will end the FIP; major sources of GHGs in Texas will submit PSD and Title V applications to TCEQ only. There will be a fiscal impact due to additional collection of PSD permit fees, Title V emissions fees, and the cost for affected sources to prepare emissions inventories.

B.) Public:
Because federal PSD permits issued by EPA under the FIP do not provide an opportunity for a contested case hearing, excluding PSD GHG applications from contested case hearings under state rules would not affect the public in a manner different than under the FIP. The public will have an opportunity to submit comments on the PSD and TV applications that are processed by the commission when the rules are approved and the FIP is lifted.

C.) Agency programs:
TCEQ programs will be affected due to an increased number of PSD and Title V permit applications. The commission will monitor the cost of implementing these rules, and if necessary, may increase air emission fees to fund the additional cost for permitting GHGs.

Stakeholder meetings:
In order to expedite the rulemaking and EPA's approval, no stakeholder meetings are planned. A public hearing will be held, as well as a public comment period of at least 30 days if the commission approves the proposed rule project for publication.

Potential controversial concerns and legislative interest:
HB 788 made the finding that TCEQ is the preferred GHG permitting authority in Texas. The bill passed with two thirds vote in both Houses, taking immediate effect upon the Governor's signature. There is legislative interest that the commission expeditiously adopt rules, so that EPA may approve rules into the SIP and concurrently lift the FIP so that Texas industry may obtain PSD and Title V permits from TCEQ rather than EPA.

Will this rulemaking affect any current policies or require development of new policies? This rulemaking does not specifically affect any current policies, however, because the rules are implementing a new and unique federal permitting scheme, changes to policies may be identified during the implementation phase.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
Failure to adopt rules and gain EPA approval will mean the FIP will remain in place and the authority to issue GHG permits will remain with EPA. In addition, HB 788 specifically directs TCEQ to adopt rules, so failure to do so would represent a failure to implement

legislative directive. There are no alternatives to rulemaking that will satisfy HB 788 and provide the opportunity for EPA's rescission of the FIP.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: October 23, 2013
Anticipated *Texas Register* publication date: November 8, 2013
Anticipated public hearing date: December 5, 2013
Anticipated public comment period: November 8, 2013 - December 9, 2013
Anticipated adoption date: March 26, 2014

Agency contacts:

Tasha Burns, Rule Project Manager, 239-5868, Air Permits Division
John M. Minter, Staff Attorney, 239-0663
Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

House Bill (HB) 788 (83rd Legislature)

cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
Tucker Royall
Office of General Counsel
Tasha Burns
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§39.411, 39.419, and 39.420; and new §39.412.

If adopted, the commission will submit §§39.411(e)(11), (15) and (16), (f)(4) and (8), 39.412(a) - (d), 39.419(e)(1), and 39.420(e)(4) to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009, (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel

economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3,

2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit

revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG

pollutants).

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) GHG emissions are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and

FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116 and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Specific Changes to Chapters 39 and 55

The proposed rulemaking in Chapters 39 and 55 would make two changes to the commission's rules that are distinguishable from current public participation rules and the Texas SIP. First, PSD GHG permit applications would not be subject to an opportunity to request a contested case hearing or reconsideration of the executive director's decision. Second, based on EPA interpretation of its rules, there may be no requirement for the

commission to prepare an air quality analysis for proposed emissions of GHG, and, if so, there will be no such analysis available for public comment.

HB 788 specifically excludes PSD GHG permit applications from the requirements relating to a contested case hearing. Requests for reconsideration were added by HB 801 (76th Legislature, 1999) as an alternative to the opportunity to request a contested case hearing. However, this remedy is not independent of the right to request a contested case hearing. Absent a right to request a contested case hearing, there is no independent right to request reconsideration of the executive director's decision. The commission interprets HB 788 to require that all other HB 801 requirements, discussed later in this preamble, apply to GHG permit applications.

The majority of the existing public participation and notice requirements in Chapters 39 and 55, which implement both federal and state law, will apply to the PSD GHG applications. Many of these requirements were clarified in or added by HB 801. The Chapter 39 amendments are proposed as revisions to the SIP, but the Chapter 55 amendment is not required for the SIP. The public participation and notice requirements include newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit (NORI) and Notice of Application and Preliminary Decision (NAPD), each with particular language; sign posting; alternate language newspaper publication and sign posting (where applicable); placement of a copy of the application, the executive director's

preliminary decision (draft permit), preliminary determination summary in a public place for review and copying; providing opportunity for and mandatory attendance at a public meeting (which is mandatory when requested by a member of the public for any PSD permit application or by a legislator who represents the general area where the facility is or is proposed to be located); and notice to certain affected agencies and representatives, including EPA Region 6, local air pollution control agencies with jurisdiction, the chief executives of the city and county where the source would be located, and any State or Federal Land Manager, and Indian Governing Body. In addition, the executive director's draft permit and preliminary decision and preliminary determination summary are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision. Finally, the executive director is required to respond to comments submitted by preparing a Response to Comments (RTC), which is mailed to commenters and posted on the commission's Web site, with the executive director's decision. Some of these requirements and procedures were changed in rulemaking and described in the preamble adopted June 2, 2010. Background information regarding the commission's public participation rules for PSD permits can be found in the preamble adopting new and amended rules as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198 - 5255, 5274 - 5277, and 5344 - 5348).

Further, based on EPA's interpretation of its rules that no air quality analysis is required for a PSD GHG permit application, there will be no such analysis available for comment for

these applications reviewed by the TCEQ. Even if the air quality analysis is a requirement under FCAA, §110, the exclusion of this analysis does not affect attainment and maintenance of the NAAQS. This is because the permit application review must include an evaluation that the proposed emissions will comply with the NAAQS, and there are no NAAQS established for GHGs. Therefore, the rule amendments will provide that an air quality analysis will be available for public comment, if applicable.

At this time, the commission expects to issue two separate notices, for both NORI and NAPD, for applications filed requesting both a PSD GHG permit and a new permit or a permit amendment for air contaminants that are not GHG.

In addition to the changes discussed earlier, the commission is proposing new §39.412. As discussed earlier, major construction projects and expansions in Texas that require PSD permits must currently file applications with both EPA Region 6 (for GHGs) and TCEQ (for all contaminants that are not GHG). After jurisdiction for issuance of PSD GHG permits is transferred to Texas, applicants who have already filed an application with EPA for a PSD GHG only permit and for which notice of draft permit was published as required by EPA, may wish to have EPA transfer that application or file an application with TCEQ for initial issuance of a PSD GHG permit. Transfer of an application from EPA will be considered filing an application with the commission. In those circumstances, which are expected to

be limited in number, applicants may choose an alternative notice option that is proposed in new §39.412.

As is the case with the commission's existing rules for notice of PSD permits, this proposed new section, together with certain existing rules that are proposed for SIP approval by EPA, also complies with the federal notice requirements. First, 40 Code of Federal Regulations (CFR) §51.161 concerns the public availability of information for review and commenting for permits generally, including: 1) a 30-day public comment period; 2) notice by prominent advertisement in at least one location in the area affected by the source or proposed source; 3) placement of a copy of the application in a location in the area affected and a copy of the TCEQ's air quality analysis; and 4) submittal of a copy of the notice to the EPA Regional Administrator and any other affected agency. These requirements are met in proposed §39.412(b)(2)(B)(vi), (C), (3)(A), and (5), respectively.

Second, 40 CFR §51.166(q) adds additional notice requirements for PSD permit applications. 40 CFR §51.166(q)(1) provides that the TCEQ is required to notify applicants with regard to completeness (or deficiency) of applications; this met by §116.114(a)(1), which is not proposed for amendment in this rulemaking.

Eight additional requirements are enumerated in 40 CFR §51.166(q)(2)(i) - (viii), some of which overlap with 40 CFR §51.161 The commission's rules meet these requirements as

follows. For 40 CFR §51.166(q)(2)(i), §116.114(a)(2), which is not proposed for amendment in this rulemaking, satisfies the requirement for the TCEQ to make a preliminary determination on the application. For 40 CFR §51.166(q)(2)(ii), §39.412(b)(3) satisfies the requirement for a copy of the application and the preliminary determination to be made available in a public place.

For 40 CFR §51.166(q)(2)(iii), §39.412(b)(2), particularly §39.412(b)(2)(B)(iii) - (v), satisfies the requirement for notice by prominent advertisement in a newspaper of general circulation in the area affected by the source or proposed source of the location of the source or proposed source that the application and preliminary decision are available for review and comment, as well as the opportunity to request a public meeting or a notice and comment hearing and to submit written public comment. The discussion regarding the addition of §39.411(f)(3) in 2010, which requires the public place to have internet access, also applies to the commission's basis for including that requirement in §39.412; that discussion can be found in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198). 40 CFR §51.166(q)(2)(iii) also requires the notice to include degree of increment consumption, which is not included in §39.412 because there is no increment established for GHG.

For 40 CFR §51.166(q)(2)(iv), §39.412(b)(5), which references §39.605, meets the requirement to notify EPA and other affected agencies. Additional discussion of the

commission's adoption of §39.605 can be found in the preamble for the rule amendments adopted in June 2010 (*See* the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198)).

For 40 CFR §51.166(q)(2)(v), §39.412(b)(2)(B)(v), as well as §39.411(g) and §55.154(c)(3), which are not proposed for amendment in this rulemaking, meet the requirement for the executive director to hold a public meeting or notice and comment hearing in response to a request from an interested person regarding a PSD application.

For 40 CFR §51.166(q)(2)(vi), §55.156(b) and (g), which are not proposed for amendment in this rulemaking, satisfy the requirement regarding the executive director's response to timely submitted written comments and at any public hearing. The use of the term "public hearing" in 40 CFR §51.166(q)(2)(vi) is understood to be EPA's notice and comment style hearing, not a contested case hearing which is available for certain applications under the Texas Clean Air Act. The FCAA and EPA's implementing regulations do not provide for a bench trial-type proceeding, which is what a contested case hearing is analogous to. A public meeting is conducted by TCEQ in the same way that a notice and comment hearing is conducted, and is an equivalent opportunity for the public to participate in the permitting process for air quality permit applications. These explanations were provided in the preambles to Chapters 39 and 55, respectively, in the June 2010 rulemaking that amended the public participation requirements for air quality permit applications (*See* the

June 18, 2010, issue of the *Texas Register* (35 TexReg 5198)). Finally, §55.156(g) and §116.114(c), which are not proposed for amendment in this rulemaking, satisfy the requirement that the commission make all comments available for public inspection.

For 40 CFR §51.166(q)(2)(vii), §55.156(g) satisfies the requirement that the executive director or commission make a final determination on the application.

Finally, for 40 CFR §51.166(q)(2)(viii), §55.156(g) and §116.114(c), which are not proposed for amendment in this rulemaking, satisfy the requirement that the applicant be notified in writing of the final permit application determination and to make that information and the executive director's RTC publicly available. In addition, compliance with 40 CFR §51.166(q)(2)(vi) and (viii) is addressed in §39.420(c), which is not proposed for amendment in this rulemaking; §39.420(c) requires the commission to make available comments and the final determination on the application for public inspection in the same locations where the preconstruction information was made available. As stated in the June 2010 preamble for public participation rule amendments, the commission interprets this as a requirement that the executive director's RTC, which is a summary of the comments submitted on an application and the agency's response to those comments, and the issued permit, be made available in the local area. The commission adopted §39.420(c)(2) which makes available all RTCs on its Web site, and also requires the draft permit preliminary determination summary, and air quality analysis, where available, be electronically

available for PSD permit applications. The posting of RTCs was established by the commission in January 2010. This rule change was in addition to the commission's long-standing practices of maintaining a copy of the final permit at the commission's headquarters in Austin and at the appropriate regional offices, and, as required by rule, by mailing a copy of the RTC to all commenters, as well as any other interested persons who have asked to be included on a mailing list for a particular application. This rule change not only satisfied but exceeds the federal rule, and thus is at least as stringent. The commission concurrently adopted similar rule amendments regarding RTCs in §55.156(g).

Federal Clean Air Act §110(l) Analysis

Removal or reduction of a SIP requirement must be analyzed under FCAA, §110(l). This rulemaking would not be backsliding under the Texas SIP. Although the SIP has long contained the Texas statutory requirement for a contested case hearing for PSD permit applications, no such counterpart exists in EPA's regulations, and the exemption from the requirement for a contested case hearing for PSD GHG permits does not remove any federal public participation requirements that are in the commission's rules. Further, the exclusion of a contested case hearing opportunity does not affect attainment and maintenance of the NAAQS. Public participation through opportunity to comment on the draft permit (as well as the application) and seek judicial review remains. In summary, the amendments to §§39.411, 39.419, and 39.420 and new §39.412 meet the public participation requirements in federal rule and the Texas SIP.

Any PSD GHG permit issued by the executive director will be subject to the Motion to Overturn Process in 30 TAC §50.139, or, if issued by the commission, will be subject to a Motion for Rehearing. Both of these administrative remedies are subject to appeal to Texas District Court for persons who participated in the steps of the administrative process by submitting comments and filing the appropriate challenge with the commission. As discussed in the preamble for the most recent rule amendments regarding public participation for air quality permit applications, as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution. The state statutory authority cited in support of the Texas Title V Operating Permit Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including the PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with

Article III of the United States Constitution is also applicable for every action of the commission subject to the Texas Clean Air Act, including PSD permit decisions.

Therefore, there will be no backsliding from any FCAA requirements if the amendments to Chapter 39 are adopted and approved as part of the Texas SIP.

Section by Section Discussion

§39.411, Text of Public Notice

Proposed subsection (e)(15) would be added to provide that notice for an air quality application for a permit under Chapter 116, Subchapter B, Division 6 that would authorize only emissions of GHGs as defined in the proposed amendment to §101.1 must include a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable from the commission. The pollutant GHGs are defined as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. To accommodate this additional type of permit, subsection (e)(11) would be amended to add a reference to subsection (e)(15), and existing subsection (e)(15) would be renumbered as subsection (e)(16).

The proposed amendment to §39.411(f)(4) would add the phrase "if applicable" to indicate that certain items may not be available for public comment. At this time, EPA has indicated that no air quality analysis is required for PSD GHG permits. In "PSD and Title

V Permitting Guidance for Greenhouse Gases," (dated March 2011) prepared by EPA's Office of Air Quality Planning and Standards, EPA stated that monitoring for GHGs is not required because EPA regulations provide an exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) for pollutants that are not listed in the appropriate section of the regulations, and GHGs are not currently included in that list. However, 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii) of EPA's regulations apply to pollutants for which no NAAQS exists. These provisions call for collection of air quality monitoring data "as the Administrator determines is necessary to assess ambient air quality for that pollutant in any (or the) area that the emissions of that pollutant would affect. "In the case of GHGs, the exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) is controlling since GHGs are not currently listed in the relevant paragraph. Nevertheless, EPA does not consider it necessary for applicants to gather monitoring data to assess ambient air quality for GHGs under 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii), or similar provisions that may be contained in state rules based on EPA's rules. GHGs do not affect "ambient air quality" in the sense that EPA intended when these parts of EPA's rules were initially drafted. Considering the nature of GHGs emissions and their global impacts, EPA stated that it is not "practical or appropriate to expect permitting authorities to collect monitoring data for the purpose of assessing ambient air impacts of GHGs." The "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) guidance is available on the EPA's Web site: *http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf*.

Furthermore, consistent with EPA's statement in the Tailoring Rule, EPA stated it is not necessary for applicants or permitting authorities to assess impacts from GHGs in the context of the additional impacts analysis or Class I area provisions of the PSD regulations for the following policy reasons. Although it is EPA's position that GHG emissions contribute to global warming and other climate changes that result in impacts on the environment, including impacts on Class I areas and soils and vegetation due to the global scope of the problem, climate change modeling and evaluations of risks and impacts of GHG emissions is typically conducted for changes in emissions orders of magnitude larger than the emissions from individual projects that might be analyzed in PSD permit reviews. Quantifying the exact impacts attributable to a specific GHG source obtaining a permit in specific places and points would not be possible with current climate change modeling. Given these considerations, GHG emissions would serve as the more appropriate and credible proxy for assessing the impact of a given facility. Thus, EPA believes that the most practical way to address the considerations reflected in the Class I area and additional impacts analysis is to focus on reducing GHG emissions to the maximum extent. In light of these analytical challenges, EPA has stated that compliance with the best available control technology analysis is the best technique that can be employed at present to satisfy the additional impacts analysis and Class I area requirements of the rules related to GHGs. TCEQ intends to implement PSD GHG permitting requirements consistent with EPA's recognition of the unique nature of GHG emissions.

Because both 40 CFR §52.21(i) and (m) are part of the Texas SIP, the commission is proposing implementation of the exemption for preparation of an air quality analysis for GHG by excluding it as a requirement in its internal permit application review and permit issuance procedures. In addition, the commission is proposing to indicate in its procedural rules that the air quality analysis will be prepared and made available for review and comment, where applicable. This requirement will continue to be applicable for PSD permit application reviews for contaminants other than GHG. Among the existing rules regarding availability of an air quality analysis for review and comment, only §39.411(f)(4) and §39.419(e)(1) do not include the "if applicable text" and thus both are proposed to be amended.

Finally, the commission is proposing to correct typographical errors including clarifying the title of a referenced chapter in subsection (b), the spelling of the word "commission's" in subsection (b)(4)(B), and to clarify the title of referenced divisions in subsection (f)(8).

§39.412, Combined Notice for Certain Greenhouse Gases Permit Applications

Proposed new §39.412 would provide the option to publish Notice of Receipt of Application and Intent to Obtain Permit combined with the Notice of Application and Preliminary Decision, instead of publishing these separately as required by §39.418 and §39.419. Proposed subsection (a) provides that this option would apply only to permit applications transferred from EPA or filed with the commission for initial issuance of a PSD permit to

authorize only GHG which, prior to receipt of the application with the commission, was filed with EPA and for which notice of draft permit was published as required by EPA.

Proposed subsection (b) lists the specific requirements for the combined notice when this option is chosen. Subsection (b)(1) lists the portions of the general notice requirements in §39.405 that apply.

The specific publication requirements are in subsection (b)(2). Subsection (b)(2)(A) specifies that the Combined Notice must meet certain requirements in §39.411(e) for the text of the notice. Proposed subsection (b)(2)(B) includes eight specific notice content requirements. Proposed subsection (b)(2)(B)(i) would require the notice to include a list of the individual GHGs proposed to be emitted. Proposed subsection (b)(2)(B)(ii) requires the notice to include a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit, and a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis, if applicable, are available electronically on the commission's Web site. Subsection (b)(2)(B)(iii) - (vi) would require the combined notice to include other information that is currently required and will continue to apply to all PSD applications, including that the executive director's documents are available electronically on the commission's Web site; the location of the public place at which a copy of the complete application and other documents are available for review and copying; a brief

description of the public comment procedures, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the Combined Notice; and that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located, there is substantial public interest in the proposed activity or at the request of any interested person. In addition, subsection (b)(2)(B)(vi) - (viii) would require the notice state that the comment period will be for at least 30 days following the last publication of the combined notice, together with the deadline to file comments or request a public meeting; any comments submitted to EPA regarding the application will not be included in the executive director's RTC unless the comments are timely submitted to the commission; and, if executive director prepares an RTC as required by §55.156, the chief clerk will make the executive director's RTC available on the commission's Web site.

Proposed subsection (b)(2)(C) would require the combined notice meet the requirements of newspaper publication in §39.603(c) and (d) and that publication must be within 33 days after the chief clerk has mailed the preliminary decision concurrently with the notice to the applicant.

Proposed subsection (b)(3)(A) and (B) requires the applicant to make a copy of the application and certain other documents, as applicable, available for review and copying at a public place with internet access in the county in which the facility is located or proposed

to be located and that the copy of the application must be updated as changes are made, if any, to the application so that the entire application must be available for review and copying.

Proposed subsection (b)(3)(C) would require the applicant make available on the first day of newspaper publication of the combined notice required by this section a copy of the executive director's preliminary decision, draft permit, preliminary determination summary and air quality analysis, if applicable. These must remain available until the commission has taken action on the application. Finally, proposed subsection (b)(3)(D) provides that if the application is submitted with confidential information the applicant must indicate in the public file that there is additional information in a confidential file marked as confidential by the applicant.

Proposed subsection (b)(4) would require the applicant to comply with the sign posting requirements of §39.604(a) and (c) - (e), except that the sign or signs must be in place on the first day of publication of the combined notice. The signs must remain in place and legible throughout the public comment period. The applicant would be required to provide verification that the sign posting was conducted according to §39.604.

Proposed subsection (b)(5) would require the applicant to comply with §39.605 regarding providing notice to certain other governmental agencies.

Proposed subsection (c) would provide that the chief clerk shall be responsible for mailing the combined notice as required by §39.602, and for transmitting the executive director's RTC as provided for in §39.420(c)(1)(A) - (B), (2), and (d).

Proposed subsection (d) would provide that the public comment period shall automatically be extended to the close of any public meeting or notice and comment hearing.

Proposed subsection (e) would provide that final action on an application may be taken under Chapter 50 after the deadline for submitting public comment. This subsection would not be submitted to EPA as a SIP revision because it is not a requirement of the FCAA.

§39.419, Notice of Application and Preliminary Decision

The proposed amendment to §39.419(e)(1) adds the phrase "if applicable" to indicate that certain items may not be available for public comment, for the same reasons as the changes discussed earlier regarding the proposed amendment to §39.411(f)(4).

§39.420, Transmittal of the Executive Director's Response to Comments and Decision

Proposed §39.420(e)(4) provides that, after the close of the comment period and when required by and subject to §55.156, the chief clerk will not include instructions for

requesting that the commission reconsider the executive director's decision and for requesting a contested case hearing for applications for a PSD permit that would authorize only GHGs as defined in the proposed amendment to §101.1.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules pertain to the public notice and hearing requirements for GHG emissions permitting requirements under the PSD air permit program.

The proposed rules would amend Chapter 39 to implement the notice requirements of HB 788, 83rd Legislature, 2013 and are part of a larger rulemaking involving Chapters 55, 101, 106, 116, and 122. This fiscal note only addresses the proposed rules for Chapter 39.

HB 788 exempts GHG PSD air permits from the requirements of a contested case hearing. The proposed rules revise the required public notice text to specify that a PSD GHG permit application is subject to a request for a public meeting and a notice and comment hearing but not a contested case hearing. In addition, the proposed rules include a change to reflect that an air quality analysis for GHG emissions is not required for a GHG permit

since no NAAQS have been set for GHGs. The proposed rules also specify the public notice requirements that will apply to a PSD GHG permit application that was initially filed with EPA, but is later transferred to or filed with TCEQ after notice of the draft permit was published. In those cases, permit applicants may publish a combined, one-time NORI and NAPD. Normally, these notices are published separately. The proposed rules also make minor grammatical corrections.

The proposed rules are not expected to have any fiscal impact on state agencies or local government entities that do not participate in the types of activities that require a PSD permit. If a local government or state agency is required to have a PSD permit for GHG emissions, then that governmental entity could experience cost benefits from not having to participate in a contested case hearing in that the lack of a hearing will tend to result in faster permit issuance for permit applicants who otherwise might have had their permit delayed by a contested case hearing. The proposed rules would not have a fiscal impact on current costs for publishing notice for a public hearing, a notice and comment hearing, or on the need for an air quality analysis. For applications originally submitted to the EPA, a combined NORI and NAPD notice will not result in a significant change in costs to the applicant.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules

are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law.

The proposed rules are not expected to have a direct fiscal impact on individuals but may have cost benefits for large businesses that require a PSD permit for GHG emissions as the proposed rules may result in faster PSD GHG permit issuance times for permit applicants who otherwise might have had their permit delayed by a contested case hearing.

By not specifying that a PSD GHG permit is subject to a contested case hearing, the permitting process is expected to become shorter, less burdensome, and less costly for an applicant. However, determining the significance of any savings from not being subject to a contested case hearing is case-specific and depends upon a variety of factors including the savings generated by not having to pay consultants, attorneys, or experts to defend a permit.

For applications originally submitted to the EPA, a combined NORI and NAPD notice will not result in a significant change in costs to the applicant. For applications submitted directly to the TCEQ, the proposed rules would not impact the cost of notice for a public hearing or a notice and comment hearing. In addition, the proposed rules would not generate savings on air quality analysis costs since GHG analysis has not been required before, nor is it required under the proposed rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses should experience the same types of benefits as a large business (if they become subject to PSD GHG permit requirements) because the proposed rules would eliminate the requirement for a contested case hearing and provide for a shorter permitting process.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rulemaking is to make the necessary procedural rule amendments necessary to implement HB 788 in Chapter 116 which is concurrently proposed to be amended to add six GHGs to the pollutants subject to the commission's PSD permitting program, consistent with federal law, as well establish the emissions thresholds for applicability of the program consistent with federal requirements in the GHG Tailoring Rule.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government

Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will amend rules for public participation for PSD GHG permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and to ensure that the rules can be a federally approved part of the Texas SIP.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code

was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal

impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the proposed rules create no additional impacts because owners and operators of major GHG sources in Texas must currently obtain a PSD permit from EPA and the proposed rules merely supplant EPA as the authority for PSD GHG permitting in Texas. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex.

1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules do not exceed an express requirement in federal or state law. This rulemaking implements relevant provisions of THSC, §382.05102, as added by HB 788 83rd Legislature, 2013. The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs. The specific intent of the proposed rulemaking is to amend rules for public participation for PSD GHG permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and

to ensure that the rules can be a federally approved part of the Texas SIP. The proposed rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking. The proposed rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the

owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking , as discussed elsewhere in this preamble, is to amend rules for public participation for PSD GHG permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and to ensure that the rules can be federally approved as part of the Texas SIP.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules update procedural rules that govern the submittal of air quality PSD GHG permit applications. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rules, if adopted, will not require any revisions to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§§39.411, 39.412, 39.419, and 39.420

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC,

§382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement House Bill 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, 382.0515, 382.0517,

382.0518, and 382.056; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§39.411. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

(b) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality Permit Applications) for air quality permit applications, those applications are subject to subsections (e) - (h) of this section. When notice of receipt of application and intent to obtain permit by publication or by mail is required by Subchapters H - J and L of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or for Subchapter M of this chapter (relating to Public Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's [commissions's] decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case

hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(11) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(12) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted; and

(13) for Class 3 modifications of hazardous industrial solid waste permits, the statement "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). When notice of application and preliminary decision by

publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (11) of this section;

(2) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications and Other Authorizations), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity; and

(7) for radioactive material licenses under Chapter 336 of this title, if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (3), (6) - (8), and (11) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures; and

(3) for notices of public meetings only, a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(e) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection.

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to:

(i) all comments regarding applications for Prevention of Significant Deterioration and Nonattainment permits under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and Plant-wide Applicability Limit permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) filed on or after the effective date of this section;

(ii) all comments regarding applications subject to the requirements of Chapter 116, Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction, filed on or after the effective date of this section; and

(iii) for all other air quality permit applications, comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any air quality permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. Where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located if there is substantial public interest in the proposed activity when requested by any interested person for the following applications that are filed on or after the effective date of this section:

(A) air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment in Chapter 116, Subchapter B of this title;

(B) applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit subject to Chapter 116 of this title; and

(C) applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards (NAAQS) or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(11) If notice is for any air quality permit application except those listed in paragraphs [paragraph] (12) and (15) of this subsection, the following information must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(A) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission within the following specified time periods;

(i) for air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(ii) for air quality permit applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction, a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(iii) for renewals of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History), a statement that a request for a contested case hearing must be received by the commission before the close of the 15-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit; or

(iv) for all air quality permit applications other than those in clauses (i) - (iii) of this subparagraph, a statement that a request for a contested case hearing must be received by the commission before the close of the 30-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit. If no hearing requests are received by the end of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, there is no further opportunity to request a contested case hearing. If any hearing requests are received before the close of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments;

(B) a statement that a request for a contested case hearing must be received by the commission;

(C) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(D) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or

activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(E) a statement that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(F) if notice is for air quality permit applications described in subparagraph (A)(iv) of this paragraph, a statement that when no hearing requests are timely received the applicant shall publish a Notice of Application and Preliminary Decision that provides an opportunity for public comment and to request a public meeting.

(12) if notice is for air quality applications for a permit under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), filed on or before January 1, 2018, a Multiple Plant Permit under Chapter 116, Subchapter J of this title (relating to Multiple Plant Permits), or for a Plant-wide Applicability Limit under Chapter 116 of this title, a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable from the commission;

(13) notification that a person residing within 440 yards of a concrete batch plant without enhanced controls under a standard permit adopted by the commission

under Chapter 116, Subchapter F of this title (relating to Standard Permits) is an affected person who is entitled to request a contested case hearing;

(14) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Commission on Environmental Quality;" [and]

(15) if notice is for air quality application for a permit under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions), a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable, from the commission; and

(16) [(15)]any additional information required by the executive director or needed to satisfy federal public notice requirements.

(f) The chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.602 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection:

(1) the information required by subsection (e) of this section;

(2) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(3) the location, at a public place in the county with internet access in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and, where applicable, preliminary decision, preliminary determination summary, and air quality analysis may be submitted, or a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(5) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity. The notice must include a statement that the comment period will be for at least thirty days following publication of the Notice of Application and Preliminary Decision;

(6) if the application is subject to final approval by the executive director under Chapter 50 of this title, a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(7) If the executive director prepares a Response to Comments as required by §55.156 of this title (relating to Public Comment Processing), the chief clerk will make the executive director's response to public comments available on the commission's Web site;

(8) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter B, Divisions 5 of this title (relating to

Nonattainment Review Permits) and 6 of this title [(relating to Prevention of Significant Deterioration Review and Nonattainment Review)]:

(A) as applicable, the degree of increment consumption that is expected from the source or modification;

(B) a statement that the state's air quality analysis is available for comment;

(C) the deadline to request a public meeting;

(D) a statement that the executive director will hold a public meeting at the request of any interested person; and

(E) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision; and

(9) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter E of this title:

(A) the deadline to request a public meeting;

(B) a statement that the executive director will hold a public meeting at the request of any interested person; and

(C) a statement that the executive director's draft permit and preliminary decision are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision.

(g) When notice of a public meeting by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications filed on or after the effective date of this section, the text of the notice must include the information in this subparagraph. Air quality permit applications filed before the effective date of this section are governed by the rules in Subchapters H and K of this chapter as they existed immediately before the effective date of this section, and those rules are continued in effect for that purpose.

(1) the information required by subsection (e)(1) - (3), (4)(A), (6), (8), (9), and (15) of this section;

(2) the date, time, and place of the public meeting, and a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, and, as applicable, preliminary determination summary, and air quality analysis may be submitted and a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(h) When notice of a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the following information:

(1) the information required by subsection (e)(1) - (3), (6), (9) and (15) of this section; and

(2) the date, time, and place of the hearing, and a brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

§39.412. Combined Notice for Certain Greenhouse Gases Permit Applications.

(a) This section applies to a permit application transferred from the United States Environmental Protection Agency (EPA) or filed with the commission for initial issuance of a Prevention of Significant Deterioration (PSD) permit to authorize only emissions of Greenhouses Gases, as defined in §101.1 of this title (relating to Definitions) which, prior to receipt of the application with the commission, was filed with EPA and for which notice of draft permit was published as required by EPA.

(b) In lieu of compliance with all other applicable requirements of this chapter regarding PSD permit applications, an applicant may fulfill the requirements of this chapter by:

(1) Complying with the requirements of §39.405(f)(3), (h)(1) - (4), (6), (8) - (11), (i) and (j) of this title (relating to General Notice Provisions);

(2) Publishing Notice of Receipt of Application and Intent to Obtain Permit combined with Notice of Application and Preliminary Decision (Combined Notice) as follows:

(A) The published Combined Notice must comply with §39.411(e)(1) - (3), (4)(A)(i), (5)(A), (6) - (9), and (16) of this title (relating to Text of Public Notice);

(B) The published Combined Notice must include the following information:

(i) a list of the individual Greenhouse Gases proposed to be emitted;

(ii) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit, and a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis, if applicable, are available electronically on the commission's Web site;

(iii) the location, at a public place with internet access in the county in which the facility is located or proposed to be located, at which a copy of the

complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(iv) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis, if applicable may be submitted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the Combined Notice;

(v) a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located, there is substantial public interest in the proposed activity or at the request of any interested person;

(vi) a statement that the comment period will be for at least 30 days following the last publication of the Combined Notice together with the deadline to file comments or request a public meeting;

(vii) a statement that any comments submitted to EPA regarding the application will not be included in the executive director's response to comments unless the comments are timely submitted to the commission; and

(viii) a statement if the executive director prepares a Response to Comments as required by §55.156 of this title (relating to Public Comment Processing), the chief clerk will make the executive director's response to public comments available on the commission's Web site; and

(C) The Combined Notice must meet the requirements of §39.603(c) and (d) of this title (relating to Newspaper Notice) and is required to be published within 33 days after the chief clerk has mailed the preliminary decision concurrently with the notice to the applicant;

(3) Making a copy of the application and certain other documents, as applicable, available for review and copying according to the following requirements:

(A) A copy of the application must be available at a public place with internet access in the county in which the facility is located or proposed to be located;

(B) The copy of the application must be updated as changes are made, if any, to the application; and the entire application must be available for review and copying;

(C) A copy of the executive director's preliminary decision, draft permit, preliminary determination summary and air quality analysis, if applicable, must be made available on the first day of newspaper publication of the Combined Notice required by this section and must remain available until the commission has taken action on the application; and

(D) If the application is submitted with confidential information indicate in the public file that there is additional information in a confidential file marked as confidential by the applicant;

(4) Complying with the requirements of §39.604(a) and (c) - (e) of this title (relating to Sign-Posting), except that the sign or signs must be in place on the first day of publication of the Combined Notice. The signs must remain in place and legible throughout the public comment period. The applicant shall provide verification that the sign posting was conducted according to §39.604 of this title; and

(5) Complying with §39.605 of this title (relating to Notice to Affected Agencies).

(c) The chief clerk shall be responsible for the following additional requirements.

(1) Mailing the Combined Notice as required by §39.602 of this title (relating to Mailed Notice).

(2) Transmitting the executive director's response to comments as provided for in §39.420(c)(1)(A) - (B), (2), and (d) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision).

(d) The public comment period shall automatically be extended to the close of any public meeting or notice and comment hearing.

(e) After the deadline for submitting public comment, final action on an application may be taken under Chapter 50 of this title (relating to Action on Applications and Other Authorizations).

§39.419. Notice of Application and Preliminary Decision.

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. Then, when this chapter requires notice under this section, notice must be given as required by subsections (b) - (e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there are different requirements in this section or a specific subchapter in this chapter for a particular type of permit. The applicant shall also publish the notice under §39.405(h) of this title (relating to General Notice Provisions), if applicable.

(c) Unless mailed notice is otherwise provided under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice).

(d) The notice must include the information required by §39.411(c) of this title (relating to Text of Public Notice).

(e) For air applications the following apply.

(1) Air quality permit applications that are filed on or after the effective date of this section, are subject to this paragraph. Applications filed before the effective date of this section are governed by the rules as they existed immediately before the effective date of this section, and those rules [rule] are continued in effect for that purpose. After technical review is complete for applications subject to the requirements of requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, as applicable, with the chief clerk and the chief clerk shall post these on the commission's Web site. Notice of Application and Preliminary Decision must be published as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications) and, as applicable, under §39.405(h) of this title, unless the application is for any renewal application of an air quality permit that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

(2) If notice under this section is required, the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice).

(3) If the applicant is seeking authorization by permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), any application submitted on or before January 1, 2018, shall be subject to the public notice and participation requirements in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities).

§39.420. Transmittal of the Executive Director's Response to Comments and Decision.

(a) Except for air quality permit applications, when required by and subject to §55.156 of this title (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

(1) the executive director's decision;

(2) the executive director's response to public comments;

(3) instructions for requesting that the commission reconsider the executive director's decision; and

(4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

(1) the applicant;

(2) any person who requested to be on the mailing list for the permit action;

(3) any person who submitted comments during the public comment period;

(4) any person who timely filed a request for a contested case hearing;

(5) Office of the Public Interest Counsel; and

(6) Office of Public Assistance.

(c) When required by and subject to §55.156 of this title, for air quality permit applications, after the close of the comment period, the chief clerk shall:

(1) transmit to the people listed in subsection (d) of this section the following information:

(A) the executive director's decision;

(B) the executive director's response to public comments;

(C) instructions for requesting that the commission reconsider the executive director's decision; and

(D) instructions, which include the statements in clause (ii) of this subparagraph, for requesting a contested case hearing for applications:

(i) for the following types of applications:

(I) permit applications which are subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits) as

described in §39.402(a)(2) of this title (relating to Applicability to Air Quality Permits and Permit Amendments);

(II) permit and permit amendment applications which are not subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title, and for which hearing requests were received by the end of the 30-day comment period following the final publication of Notice of Receipt of Application and Intent to Obtain Permit, and these requests were not withdrawn as described in:

(-a-) §39.402(a)(1), (3), (11) and (12) of this title; and

(-b-) §39.402(a)(4) and (5) of this title;

(III) applications described in §39.402(7) of this title; and

(ii) the following statements must be included:

(I) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;

(II) that a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(III) that a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(IV) that only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted; and

(V) that a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment; and

(2) for applications subject to the requirements of requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title, make available by electronic means on the commission's Web site the executive director's draft permit and preliminary decision, the executive director's response to public comments, and as applicable, preliminary determination summary and air quality analysis.

(d) The following persons shall be sent the information listed in subsection (c) of this section:

(1) the applicant;

(2) any person who requested to be on the mailing list for the permit action;

(3) any person who submitted comments during the public comment period;

(4) any person who timely filed a request for a contested case hearing;

(5) Office of the Public Interest Counsel; and

(6) Office of Public Assistance.

(e) For air quality permit applications which meet the following conditions, items listed in subsection (c)(1)(C) and (D) of this section are not required to be included in the transmittals:

(1) applications for which no timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain a Permit;

(2) applications for which one or more timely hearing requests are submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and for which this is the only opportunity to request a hearing, and all of the requests are withdrawn before the date the preliminary decision is issued; [or]

(3) the application is for any renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History)<u>; or</u> [.]

(4) applications for a Prevention of Significant Deterioration permit that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions);

(f) For applications for which all timely comments and requests have been withdrawn before the filing of the executive director's response to comments, the chief clerk shall transmit only the items listed in subsection (a)(1) and (2) of this section and the executive director may act on the application under §50.133 of this title (relating to Executive Director Action on Application or WQMP Update).

(g) For post-closure order applications under Subchapter N of this chapter (relating to Public Notice of Post-Closure Orders), the chief clerk shall transmit only items listed in subsection (a)(1) and (2) of this section to the people listed in subsection (b)(1) - (3), (5), and (6) of this section.

(h) For applications for air quality permits under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), the chief clerk will not transmit the item listed in subsection (a)(4) of this section.

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes an amendment to §55.201.

Background and Summary of the Factual Basis for the Proposed Rule

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave United States Environmental Protection Agency (EPA) the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's

interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' State Implementation Plan (SIP) in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the

time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of

the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of

GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) GHG emissions are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to

automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 101 (General Air Quality Rules), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Proposed Amendments to Chapters 39 and 55

The commission proposes changes to two chapters regarding public participation. The proposed amendments to Chapters 39 and 55 are distinguishable from current public participation rules and the Texas SIP. First, PSD GHG permit applications would not be subject to an opportunity to request a contested case hearing or reconsideration of the executive director's decision. Second, based on EPA's interpretation of its PSD rules, no air quality analysis is required for GHG permits. Therefore, when no such analysis is required, none will be prepared by the commission and available for public comment.

HB 788 specifically excludes PSD GHG permit applications from the requirements relating to a contested case hearing. Requests for reconsideration were added by HB 801 (76th

Legislature, 1999) as an alternative to the opportunity to request a contested case hearing. However, this remedy is not independent of the right to request a contested case hearing. Absent a right to request a contested case hearing, there is no independent right to request reconsideration of the executive director's decision. The commission interprets HB 788 to require that all other HB 801 requirements, discussed later in this preamble, apply to GHG permit applications.

In addition, although HB 788 does not specify that PSD GHG permit applications are exempt from requests for the commission to reconsider the executive director's preliminary decision, the legislative history of the bill provides that the intent of HB 788 is to shorten the time to obtain a permit by simplifying the permit process. Requests for reconsideration and contested case hearing are interim administrative remedies which add time to the process, and are not part of EPA's procedural mechanisms.

The majority of the existing public participation and notice requirements in Chapters 39 and 55, which implement both federal and state law, will apply to the PSD GHG applications. Many of these requirements were clarified in or added by HB 801. The Chapter 39 amendments are proposed as revisions to the SIP, but the Chapter 55 amendment is not required for the SIP. The public participation and notice requirements include newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision, each with particular language;

sign posting; alternate language newspaper publication and sign posting (where applicable); placement of a copy of the application, the executive director's preliminary decision (draft permit), and preliminary determination summary in a public place for review and copying; providing opportunity for and mandatory attendance at a public meeting (which is mandatory when requested by a member of the public for any PSD permit application or by a legislator who represents the general area where the facility is or is proposed to be located); and notice to certain affected agencies and representatives, including EPA Region 6, local air pollution control agencies with jurisdiction, the chief executives of the city and county where the source is or would be located, and any State or Federal Land Manager, and Indian Governing Body. In addition, the executive director's draft permit and preliminary decision, and preliminary determination summary are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision. Finally, the executive director is required to respond to comments submitted by preparing a Response to Comments, which is mailed to commenters and posted on the commission's Web site, with the executive director's decision. Some of these requirements and procedures were changed in rulemaking and described in the preamble adopted June 2, 2010. Background information regarding the commission's public participation rules for PSD permits can be found in the preamble adopting new and amended rules as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198 - 5255, 5274 - 5277, and 5344 - 5348).

Any PSD GHG permit issued by the executive director will be subject to the Motion to Overturn Process in §50.139, or, if issued by the commission, will be subject to a Motion for Rehearing. Both of these administrative remedies are subject to appeal to Texas District Court for persons who participated in the steps of the administrative process by submitting comments and filing the appropriate challenge with the commission. As discussed in the preamble for the most recent rule amendments regarding public participation for air quality permit applications, as published in the June 18, 2010 issue of the *Texas Register* (35 TexReg 5198), access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating Permit Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including the PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United

States Constitution is also applicable for every action of the commission subject to the Texas Clean Air Act (TCAA), including PSD permit decisions.

Section Discussion

The proposed amendment to §55.201(i)(3)(C) would provide that an application for an air quality permit under Chapter 116, Subchapter B, Division 6 that would authorize only emissions of GHGs (as defined in proposed amendments to 30 TAC §101.1) is a type of application that is not subject to contested case hearing. This proposed amendment is consistent with HB 788 and the corresponding statute in THSC, §382.05102(d). Existing subparagraph (C) would be re-lettered as subparagraph (D).

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule. The proposed rule pertains to the public notice requirements for GHG emissions under the PSD air permit program.

The proposed rule would amend Chapter 55 to implement the notice requirements of HB 788, 83rd Legislature, 2013, and are part of a larger rulemaking involving Chapters 39,

101, 106, 116, and 122. This fiscal note only addresses the proposed rule for Chapter 55.

HB 788 exempts GHG PSD air permits from the requirements of a contested case hearing. The proposed rule adds new language in Chapter 55 to specify that applications for a PSD permit to authorize GHGs would not be subject to a contested case hearing. The proposed rule would tend to result in a faster permit issuance for those applicants who otherwise might have had a permit delayed by a contested case hearing.

The proposed rule is not expected to have fiscal implications for state agencies or local government entities that do not participate in the types of activities that require a PSD permit. If a local government or state agency is required to have a PSD permit for GHG emissions, then that governmental entity could experience cost benefits from not having to participate in a contested case hearing in that the lack of a hearing will tend to result in faster permit issuance for permit applicants who otherwise might have had their permit delayed by a contested case hearing. Because no GHG PSD permits have been issued, affected entities will not experience any cost savings.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and an efficient GHG PSD permitting process.

The proposed rule is not expected to have a direct fiscal impact on individuals but may have cost benefits for large businesses that require a PSD permit for GHG emissions as the proposed rule may result in faster GHG PSD permit issuance times for permit applicants who otherwise might have had their permit delayed by a contested case hearing.

By not specifying that a GHG PSD permit is subject to a contested case hearing, the permitting process is expected to become shorter, less burdensome, and less costly for an applicant. However, determining the significance of any savings from not being subject to a contested case hearing is case-specific and depends upon a variety of factors including the savings generated by not having to pay consultants, attorneys, or experts to defend a permit.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or implementation of the proposed rule during the first five years the proposed rule is in effect. Small businesses should experience the same types of cost benefits as a large business (if they become subject GHG PSD permit requirements) because the proposed rule would exempt a small business from a contested case hearing and provide for a shorter permitting process.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an exemption from requests for contested case hearing for applications for PSD GHG permits.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed amendment was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, and is specifically required by state law. The specific intent of this proposed

rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an exemption from requests for contested case hearing for applications for PSD GHG permits. Further, the proposed amendment does not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental

action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending the rule to add an exemption from requests for contested case hearing for applications for PSD GHG permits.

The proposed rule will not create any additional burden on private real property. The proposed rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to

the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rule updates a procedural requirement that governs the submittal of air quality PSD GHG permit applications. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rule, if adopted, will not require any changes to outstanding federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

§55.201

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or

modifications to existing facilities that may emit air contaminants; THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit . Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788 (83rd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, 382.0515, 382.0518, and 382.056; and Texas Government Code, §2001.004 and §2001.006.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by

the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title [chapter] (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title [chapter], who was provided notice as

required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program); [or]

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) (C)] amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen

project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to Restoration);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer

restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§101.1, 101.10, 101.27, and 101.201.

If adopted, the commission will submit §§101.1, 101.10, and 101.201 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009, (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel

economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3,

2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit

revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG

pollutants).

Although Texas has an EPA-approved Title V operating permit program, it currently lacks the approval to permit sources that are major sources subject to Title V as a result of their emissions of GHGs. In EPA's "Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule," as published in the December, 30, 2010, issue of the *Federal Register* (75 FR 82254), EPA stated in footnote 8 that in this situation, there is no obligation for these major GHG sources to apply for a Title V permit until such time as the state amends its rules to make the permit program applicable to them.

House Bill (HB) 788, 83rd Legislature, 2013 added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a

future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation

of HB 788, obtaining SIP approval of certain rules, and the lifting of the FIP.

Implementation of HB 788

THSC, §382.0215 provides that the commission require the owner or operator of a regulated entity that experiences emissions events to maintain a record of all emissions events at the regulated entity in the manner and for the periods prescribed by commission rule. However, not all emissions events, consisting of emissions from upset events and unscheduled maintenance, startup and shutdown (MSS) activities, are required to be reported under §101.2o1. THSC, §382.0215 also authorizes the commission to establish the reportable quantities (RQs) of air contaminants associated with emissions events and requires the owner or operator of a regulated entity to notify the commission for each emissions event that meets or exceeds an RQ. The reporting provides useful information to evaluate the event for protection of air quality. In 1997 and 1999, the commission adopted RQs and updated its rules to clarify when and how emissions must be recorded and reported, considering reporting requirements found in other state and federal regulations, enhancement of compliance, and utilization of TCEQ resources. The commission uses the reports to determine compliance with the rule and claims of affirmative defense, determine excessive emissions events, organize potential monitoring of long duration events, provide technical assistance to emergency personnel, and inform the public. The records are also used to evaluate trends and provide an enforcement perspective. More information can be found in the rulemaking that first adopted the RQs in the July 29, 1997, issue of the *Texas*

Register (22 TexReg 7040), and also for amendments to the rule in the December 17, 1999, issue of the *Texas Register* (24 TexReg 11494).

The RQ establishes what should be reported as soon as practicable within the 24-hour timeframe provided in THSC, §382.0215. The RQs are not intended to represent a judgment as to the specific degree of hazard associated with certain releases, but rather function as a mechanism by which the regulated community will know when to notify the commission of unauthorized emissions. When the RQs were first established, the recordkeeping requirements replaced the requirement to report events that do not meet an RQ.

The commission is proposing that there will be no RQ for CO_2, nitrous oxide (N_2O), methane (CH_4), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), or sulfur hexafluoride (SF_6), individually or collectively, except for the HFCs that are listed specifically in the definition of RQ. The proposed amendments would also exempt reporting of these six air contaminant compounds as part of a mixture with other air contaminant compounds. Further, any emissions of CO_2, N_2O, CH_4, HFCs, PFCs, or SF_6, individually or collectively, are not required to be submitted as part of the final record described in §101.201(c), except for the HFCs that are listed specifically in the definition of RQ. With regard to GHGs, the commission has found no basis for receiving any reports of excess emissions due to emissions events and therefore proposes to exempt these from

reporting under §101.201. A source which has emissions exceeding PSD GHG permit limits would be subject to recordkeeping for the unauthorized emissions of GHGs and other pollutants. If an RQ was exceeded, reporting under §101.201 is required for pollutants other than GHGs (except the HFCs specifically listed). All unauthorized emissions would also be considered Title V deviations and would be required to be included in semi-annual reporting required in Chapter 122.

Unauthorized emissions are defined as exceeding a permit limit, rule, or order of the commission. A source that is not required to have a PSD GHG permit does not have a limit for which unauthorized emissions can be evaluated and therefore will not, by definition, have an emissions event of GHGs. Consequently, there is no recordkeeping requirement for unauthorized emissions of GHGs for a source that is not required to have a PSD GHG permit. However, recordkeeping of unauthorized emissions of other pollutants remains a requirement, and reporting under §101.201 may be required.

The commission is also proposing to repeal CO_2 and CH_4 from the definition of "Unauthorized emissions". By removing the terms, these two GHGs will no longer be exempted from the definition of unauthorized emissions. Because no GHGs will be listed in the exception, all GHGs would be considered as unauthorized emissions if they exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act (TCAA), THSC, §382.0518(g).

§101.10, Emissions Inventory Requirements

Implementation of HB 788 also necessitates the amendment of §101.10. Owners and operators of accounts that are currently required to submit an annual emissions inventory include any source that meets the definition of a major facility or major stationary source as defined in §116.12, or a source that emits or has the potential to emit 100 tons per year (tpy) of a contaminant. Under these requirements, a small source emitting 100 tpy of GHGs would be required to submit an annual emissions inventory. It is not the commission's intent to require these small-emitting sources to submit emissions inventories because this additional data would not contribute substantially to the inventory, and the commission could not administratively process the additional number of inventories received. Therefore, an exception to this 100 tpy reporting threshold is proposed for §101.10(a)(3) for emissions of GHGs. Only major sources required to obtain a PSD permit (at the thresholds proposed in new §116.164) would be required to submit an inventory.

Under the proposed revisions, owners and operators of accounts that include sources that are required to obtain a PSD permit for GHGs would be required to submit an initial emissions inventory and annual emissions inventory update required under subsection (b). At this time, the commission does not propose requiring the reporting of emissions of GHGs from any source required to submit an emissions inventory per §101.10 unless

otherwise required through future rulemaking or specifically requested under the authority of §101.10(b)(3), special inventories as part of any future analysis to assess additional emissions fees to fun HB 788. Owners and operators that are required to submit an annual emissions inventory are required to report emissions of all pollutants listed in §101.10(b)(1). GHGs are not included in §101.10(b)(1).

§101.27, Emissions Fees

Implementation of HB 788 also necessitates the amendment of §101.27. Emissions fees are collected each fiscal year from regulated entities subject to federal operating permits under Chapter 122 (Federal Operating Permits Program, commonly referred to as Title V permitting). The fees are based on actual or authorized emissions of all regulated pollutants emitted from these sites including emissions of criteria pollutants, hazardous air pollutants, and other regulated emissions up to a cap of 4,000 tons per pollutant.

The emissions fee rule allows the rate to be adjusted annually in a range of $25 to $45 dollars per ton. This flexibility allows the agency to collect revenue necessary to fully fund the Title V program. The base rate is currently set at $25 per ton which resulted in an adjusted rate of $47.49 per ton for fiscal year 2014.

The proposed amendment to §101.27 excludes the GHGs defined in proposed amendment to §101.1 from fee collection requirements. However, sources that are required to obtain a

Title V permit because of emissions of GHGs would be required to pay emissions fees on non-GHG pollutants. Owners or operators of these sources will pay fees on emissions of any pollutant subject to FCAA, §111; any pollutant listed as a hazardous air pollutant under FCAA, §112; each pollutant that a national primary ambient air quality standard has been promulgated (including carbon monoxide); and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders. For purposes of §101.27 only, the term "regulated pollutant" does not include the individual GHGs as listed in the definition §101.1; thus excluding the GHGs from the emissions fee. The current and projected fees are anticipated to cover the cost of the program in the near term.

Proposed New Reportable Quantity for Fire Protection Fluid

In addition to the changes in Chapter 101 to implement HB 788, the commission is proposing to add a new RQ for 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8 (hereafter C6 fluoroketone) in §101.1. On May 22, 2013, the commission approved a rulemaking petition from 3M Company filed on April 1, 2013 (Docket Number 2013-0700-RUL), requesting that its fire protection fluid be listed in §101.1(88), to establish an RQ of 5,000 pounds instead of the default RQ of 100 pounds. The chemical is sold as 3M™ Novec™ 1230 Fire Protection Fluid. According to the petition, the fluid is "used to extinguish fires in high valued assets" that cannot be protected with water.

The proposed new RQ would increase the reporting threshold for C6 fluoroketone. In considering reportable quantities, the TCEQ considers toxicological effects, photochemical reactivity for producing ozone, and its intent of limiting emissions events reports to the most significant events. C6 fluoroketone is neither a criteria pollutant nor a precursor of ozone, and therefore the 100-pound default for nonattainment and maintenance areas should not apply.

No signs of acute toxicity were observed in rats exposed to 100,000 parts per million (ppm) C6 fluoroketone for up to four hours. The "no observed adverse effect" level for acute toxicity in rats was 100,000 ppm or 10%. Other toxicity studies have concluded that C6 fluoroketone is only minimally irritating to the eye, non-irritating to the skin, and does not cause sensitization. There have been no complaints of adverse health effects from human experience with exposures to C6 fluoroketone. C6 fluoroketone is safe to the public when discharged in the event of a fire. C6 fluoroketone was approved by the EPA in 2002 (67 FR 77931) as an acceptable substitute for ozone-depleting substances, such as halon 1301, for use in fire suppression.

Section by Section Discussion

§101.1, Definitions

The commission proposes to amend §101.1 to add the definition of GHGs, set an RQ for a

compound in response to a rulemaking petition, provide that there is no RQ for GHGs (except for the specific individual air contaminant compounds found in the current RQ definition), amend the definition of unauthorized emissions to exclude CO_2 and CH_4, and make nonsubstantive revisions including renumbering and clarifying references.

The commission proposes §101.1(42) to add a definition of the pollutant GHGs and to appropriately renumber the paragraphs of §101.1. The proposed definition would establish that the pollutant GHGs is an aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and SF_6. This proposed definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are considered GHGs are not included in the definition of the pollutant GHGs.

The commission also proposes to add a new RQ of 5,000 lbs in §101.1(89)(A)(i)(III)(-aaa-) for 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. The proposed new RQ would increase the reporting threshold for C6 fluoroketone. In considering reportable quantities, the TCEQ considered toxicological effects, photochemical reactivity for producing ozone, and its intent of limiting emissions events reports to the most significant events. C6 fluoroketone is neither a criteria pollutant nor a precursor of ozone, and therefore the 100-pound default for nonattainment and

maintenance areas should not apply.

No signs of acute toxicity were observed in rats exposed to 100,000 ppm C6 fluoroketone for up to four hours. The "no observed adverse effect" level for acute toxicity in rats was 100,000 ppm or 10%. Other toxicity studies have concluded that C6 fluoroketone is only minimally irritating to the eye, non-irritating to the skin, and does not cause sensitization. There have been no complaints of adverse health effects from human experience with exposures to C6 fluoroketone. C6 fluoroketone is safe to the public when discharged in the event of a fire. C6 fluoroketone was approved by the EPA in 2002 (67 FR 77931) as an acceptable substitute for ozone-depleting substances, such as halon 1301, for use in fire suppression.

The commission also proposes to add §101.1(89)(A)(iii) to provide that there would be no RQ for GHGs, except for the specific individual air contaminant compounds found in the current RQ definition. A source which has emissions exceeding PSD GHG permit limits would be subject to recordkeeping for unauthorized emissions of GHGs and other pollutants. All unauthorized emissions would also be considered Title V deviations and would be required to be included in semi-annual reporting required in Chapter 122.

Unauthorized emissions are defined as exceeding a permit limit, rule, or order of the commission. A source that is not required to have a PSD GHG permit does not have a limit

for which unauthorized emissions can be evaluated and therefore will not, by definition, have an emissions event of GHGs. Consequently, there is no recordkeeping requirement for unauthorized emissions of GHGs for a source that is not required to have a PSD GHG permit. However, recordkeeping of unauthorized emissions of other pollutants remains a requirement, and reporting under §101.201 may be required.

In proposed §101.1(108), the commission removes the words "carbon dioxide" and "methane" from the definition of "Unauthorized emissions" because these will now be regulated as GHGs. By removing the terms, these two GHGs will no longer be exempted from the definition of unauthorized emissions. Because no GHGs will be listed in the exception, all GHGs would be considered as unauthorized emissions if they exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act (TCAA), THSC, §382.0518(g).

In §101.1(25), the commission proposes nonsubstantive amendments to clarify the referenced rule is in the Code of Federal Regulations (CFR). In §101.1(61), the commission proposes nonsubstantive amendments to the definition of mobile emissions reduction credit. The added clarifying language provides the title of the referenced division, Emission Credit Banking and Trading. The commission proposes nonsubstantive amendments to the definition of particulate matter emissions, to clarify the chemical formula NO_X refers to nitrogen oxides in §101.1(77). The commission also proposes amendments in §101.1(89)

correcting CFR to CFC for four air contaminant compounds.

§101.10, Emissions Inventory Requirements

The commission proposes to amend §101.10(a)(3) by adding an exception for GHGs (as listed in the proposed amendment to §101.1) to the applicable criteria for which an owner or operator is required to submit emissions inventories. Specifically, the exception is added to the requirement for any account that emits or has the potential to emit 100 tons per year (tpy) or more of any contaminant.

The commission also proposes nonsubstantive revisions for this section. Subsection (a) is proposed to be renumbered to reflect the subsection reorganization for clarity. Subsection (b) has been updated to reflect the renumbering in subsection (a). The title of §116.12 was updated in subsection (a)(1) to "Nonattainment and Prevention of Significant Deterioration Review Definitions" to reflect the current title of the rule. In subsection (a)(4) the acronym for Federal Clean Air Act was expanded for clarification. In subsections (b)(3) and (e) the word industrial was removed from the name of the "Emissions Assessment Section" to reflect its current name. Subsection (f) was updated to reflect the current enforcement authority for completing an emissions inventory. Enforcement by appropriate action includes Texas Water Code (TWC), §7.002 for administrative penalties, §7.101 for civil penalties, and §7.178 for criminal penalties.

§101.27, Emissions Fees

The commission proposes to amend subsection (f)(3) by excepting GHGs as defined in §101.1 from the term "regulated pollutant" for the purposes of §101.27. This change is necessary to exempt GHGs from the list of pollutants subject to fees. GHGs are being exempted because certain GHGs, like CO_2, are emitted in such large quantities that the resulting fee collection would be in excess of current near-term program funding requirements.

Existing sites in Texas will become subject to the Title V federal operating permits program on the effective date of EPA's final action approving the revisions to the Federal Operating Permits Program or approving revision of §122.122 into the SIP, whichever is later. For example, if the later of the two actions is effective on or before August 31, 2014 (the end of Fiscal Year 2014), existing sources which meet or exceed the Title V major source thresholds in proposed §122.122(14)(H) will become subject to emissions fees on that day. Since fees for Fiscal Year 2014 would have already been invoiced at that date, an emissions fee for Fiscal Year 2014 for these sources would be assessed as soon as practical and would be based on emissions of non-GHGs in calendar year 2012 (or other data allowed per §101.27). If the later of the two EPA actions is effective on or after September 1, 2014 (in Fiscal Year 2015), then these sources will become subject to emissions fees on that day. An emissions fee for Fiscal Year 2015 would typically be invoiced in fall of calendar year 2014

and would be based on emissions of non-GHGs in calendar year 2013 (or other data allowed per §101.27).

§101.201, Emissions Event Reporting and Recordkeeping Requirements

The commission proposes to amend subsection (c) to provide that any emissions of CO_2, N_2O, CH_4, HFCs, PFCs, or SF_6, individually or collectively, are not required to be submitted as part of the final record under this subsection. This is consistent with the proposed change adding §101.1(89)(A)(iii) to provide that there would be no RQ for GHGs, except for the specific individual air contaminant compounds found in the current RQ definition.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will not have any fiscal implications for other state agencies or units of local government.

The proposed rules would amend Chapter 101 to implement the requirements of HB 788, 83rd Legislature, 2013, as part of a larger rulemaking involving Chapters 39, 55, 106, 116, and 122. This fiscal note only addresses the proposed rules for Chapter 101.

Proposed amendments to implement HB 788

The proposed rules would amend Chapter 101 to clarify that, for emissions event and scheduled MSS rules, all emissions of GHGs are exempt from reporting requirements under §101.201. The proposed rules also clarify that emission fees will not be assessed on emissions of GHGs. Emissions of GHGs are not currently charged an emission fee in Texas, so this rule change carries forward existing practice. The rule change is necessary because GHGs are becoming a regulated pollutant and therefore would be subject to fees under §101.27 unless this exclusion is added. Note that under existing requirements of §101.27, sites which are required to obtain a federal operating permit under Chapter 122 as a result of emissions of GHGs will be required to pay a fee on their non-GHG pollutants. In addition, existing requirements of §101.10 specify that major sources as defined in §116.12 are required to submit an emissions inventory, and changes to Chapter 116 as part of this HB 788 implementation will result in additional sources becoming subject to emissions inventory requirements. These fee impacts and emissions inventory impacts are discussed in the fiscal notes for Chapter 122 and Chapter 116, respectively, because the changes to those chapters are what cause those existing requirements of Chapter 101 to apply to major sources of GHGs.

In implementing the previous changes some specific amendments in the proposed rules include: a definition of GHGs; a revision to the definition of RQs so that emissions of GHGs are not required to be reported for emissions events or scheduled MSS; a revision to

clarify that emissions of GHGs are not counted towards the 100 tpy emissions inventory criteria in §101.10(a)(3); a change to clarify that GHGs are not considered regulated pollutants under the fee system of §101.27; and a change in the definition of unauthorized emissions to clarify that GHGs will be permitted pollutants. The result of the proposed rules (when combined with proposals in other chapters) clarify that emissions of GHGs will not be reportable for emission events purposes, scheduled MSS purposes, or for emissions inventories.

Proposed amendments to respond to a petition

Finally, in response to the 3M petition received by the agency, the proposed rules would also establish a 5,000 pound RQ threshold instead of the default 100 pound RQ for C6 fluoroketone (a fire retardant).

Fiscal Impact on Governmental Entities

Other state agencies and units of local government will not experience any fiscal impacts as a result of the proposed rules for Chapter 101. Current rules have never required the reporting of emissions of GHGs, and the proposed rules clarify that reporting emissions of GHGs will not be required for emissions inventory or under §101.201 for emissions events or unscheduled MSS. In the case of the proposed RQ for C6 fluoroketone, the proposed rules are expected to have minimal fiscal impact since the compound is expected to be used on very rare occasions and in specific circumstances.

Agency revenue will not increase as a result of the proposed rules, and regulated entities will not be required to pay additional emission fees for emissions of GHGs.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and clarification of reporting requirements for emissions of GHGs.

The proposed rules would amend Chapter 101 to clarify that, for emissions event and scheduled MSS reporting rules, all emissions of GHGs are exempt from reporting requirements under §101.201. Also, the proposed rules clarify that emission fees will not be assessed on emissions of GHGs, although major Title V sources of GHGs will be required to pay fees on emissions of non-GHGs under existing rules. Finally, in response to a petition received by the agency, the proposed rules would also establish a 5,000 pound RQ threshold instead of the default 100 pounds RQ for C6 fluoroketone.

Individuals and businesses will not experience significant fiscal impacts under the proposed rules because they are either clarifying in nature, continue current agency reporting requirements for emissions of GHGs or are, as with C6 fluoroketone, expected to

be applicable to very rare circumstances. The proposed Chapter 101 rules are consistent with changes to be made in other air emission regulations for major sources.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules because they are either clarifying in nature, continue current agency reporting requirements for emissions of GHGs, or are, as with C6 fluoroketone, expected to be applicable to very rare circumstances.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rulemaking is to implement HB 788 by adding a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and SF_6; and establishing a new reportable quantity for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory

impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, the amendments to Chapter 101 would add a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and SF_6. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented

in the emissions inventory and emissions fee requirements of the commission's rules.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full

regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the proposed rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permits from EPA and the proposed rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App.

Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules do not exceed an express requirement in federal or state law. The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs, as well as specific requirements of the TCAA. The specific intent of the proposed rulemaking is to implement HB 788 by adding a definition of the pollutant GHGs as an

aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and SF_6. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules. The rulemaking also would add a new reportable quantity for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. The proposed rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking. The proposed rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the TWC, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property

owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by adding a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and SF_6. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules. The rulemaking also would add a new reportable quantity for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8.

The proposed rules will not create any additional burden on private real property. The

proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.)*, and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules update rules that govern the submittal of air quality

PSD and Title V GHG permit applications and associated emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Sections 101.1 and 101.10 are applicable requirements in the Federal Operating Permits Program (Chapter 122). However, the proposed rules, if adopted, would not require any revisions to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of

registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER A: GENERAL RULES

§§101.1, 101.10, 101.27

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require submittal of information regarding emissions of air contaminants; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and

maintaining records of emissions of air contaminants; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; THSC, §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events; THSC, §382.05102, concerning Permitting Authority of Commission; Greenhouse Gas Emissions, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.062, concerning Application, Permit and Inspection Fees, which authorizes the commission to charge these types of fees; and THSC, §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order. The amendments are also proposed under Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Prepatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement House Bill 788, 82nd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, 382.0216, 382.05102, and 382.062; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) De minimis impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the significance levels as specified in 40 Code of Federal Regulations [(CFR)] §51.165(b)(2).

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts

60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Greenhouse gases -- the aggregate group of six greenhouse gases: carbon dioxide (CO2), nitrous oxide (N2O), methane (CH4), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6).

(43) [(42)] Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*., as amended.

(44) [(43)] Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(45) [(44)] High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(46) [(45)] High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(47) [(46)] Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion

unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(48) [(47)] Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(49) [(48)] Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(50) [(49)] Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain

plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(51) [(50)] Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(52) [(51)] Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(53) [(52)] Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(54) [(53)] Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(55) [(54)] Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a

maintenance plan under 42 United States Code, §7505a, as described in 40 Code of Federal Regulations Part 81 and in pertinent Federal Register notices.

(56) [(55)] Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(57) [(56)] Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(58) [(57)] Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(59) [(58)] Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(60) [(59)] Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing,

cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(61) [(60)] Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter (relating to Emission Credit Banking and Trading).

(62) [(61)] Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(63) [(62)] Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(64) [(63)] Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(65) [(64)] Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(66) [(65)] Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(67) [(66)] National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(68) [(67)] Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(69) [(68)] New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(70) [(69)] Nitrogen oxides (NO_X)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(71) [(70)] Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard (NAAQS or standard) for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations (CFR) Part 81 and pertinent Federal Register notices. The designations and classifications for the one-hour ozone national ambient air quality standard in 40 CFR Part 81 were retained for the purpose of anti-backsliding and

upon determination by the EPA that any requirement is no longer required for purposes of anti-backsliding, then that requirement no longer applies.

(72) [(71)] Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(73) [(72)] Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(74) [(73)] Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(75) [(74)] Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(76) [(75)] Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(A) Particulate matter with diameters less than 10 micrometers (PM_{10})--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(B) Particulate matter with diameters less than 2.5 micrometers (PM2.5)--Particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by a reference method based on 40 CFR Part 50, Appendix L, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(77) [(76)] Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(A) Direct PM emissions--Solid particles emitted directly from an air emissions source or activity, or gaseous emissions or liquid droplets from an air emissions

source or activity which condense to form particulate matter at ambient temperatures. Direct 2.5 micrometers (PM2.5) emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal materials, metals, and sea salt).

(B) Secondary PM emissions--Those air pollutants other than PM2.5 direct emissions that contribute to the formation of PM2.5 . PM2.5 precursors include sulfur dioxide (SO_2), nitrogen oxides (NO_X), volatile organic compounds, and ammonia.

(78) [(77)] Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(79) [(78)] PM2.5 emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method approved under a state implementation plan or under a United States Environmental Protection Agency delegation or approval.

(80) [(79)] PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(81) [(80)] Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(82) [(81)] Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(83) [(82)] Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given

process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(84) [(83)] Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(85) [(84)] Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(86) [(85)] Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(87) [(86)] Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(88) [(87)] Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(89) [(88)] Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC [CFR]-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFC [CFR]-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-terachlorodifluoroethane (CFC [CFR]-112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) - 5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFC [CFR]-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trilfloroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; [or]

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds; or

(-aaa-) 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8, or C6 fluoroketone – 5,000 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(iii) for greenhouse gases, individually or collectively, there is no reportable quantity, except for the specific individual air contaminant compounds listed in this paragraph;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated

hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(90) [(89)] Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(91) [(90)] Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from

scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(92) [(91)] Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(93) [(92)] Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(94) [(93)] Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq*.).

(95) [(94)] Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(96) [(95)] Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(97) [(96)] Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(98) [(97)] Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(99) [(98)] Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(100) [(99)] Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(101) [(100)] Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or,

when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(102) [(101)] Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(103) [(102)] Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H2 SO4 and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(104) [(103)] Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(105) [(104)] Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(106) [(105)] Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(107) [(106)] True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(108) [(107)] Unauthorized emissions--Emissions of any air contaminant except [carbon dioxide,] water, nitrogen, [methane,] ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(109) [(108)] Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(110) [(109)] Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(111) [(110)] Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(112) [(111)] Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(113) [(112)] Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(114) [(113)] Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(115) [(114)] Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(116) [(115)] Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on January 21, 2009 (74 FR 3441).

(117) [(116)] Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

§101.10. Emissions Inventory Requirements.

(a) Applicability. The owner or operator of an account or source in the State of Texas or on waters that extend 25 miles from the shoreline meeting one or more of the following conditions shall submit emissions inventories [and/]or related data as required in subsection (b) of this section to the commission on forms or other media approved by the commission:

(1) an account which meets the definition of a major facility/stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions);

(2) [or] any account in an ozone nonattainment area emitting a minimum of ten tons per year (tpy) volatile organic compounds (VOC), 25 tpy nitrogen oxides (NO_X), or 100 tpy or more of any other contaminant subject to national ambient air quality standards (NAAQS);

(3) [(2)] any account that emits or has the potential to emit 100 tpy or more of any contaminant except for GHGs, individually or collectively, as listed in §101.1 of this chapter (relating to Definitions);

(4) [(3)] any account which emits or has the potential to emit 10 tons of any single or 25 tons of aggregate hazardous air pollutants as defined in Federal Clean Air Act (FCAA), §112(a)(1); and

(5) [(4)] any minor industrial source, area source, non-road mobile source, or mobile source of emissions subject to special inventories under subsection (b)(3) of this section. For purposes of this section, the term "area source" means a group of similar activities that, taken collectively, produce a significant amount of air pollution.

(b) Types of inventories.

(1) Initial emissions inventory. Accounts, as identified in subsection (a)(1), (2), [or] (3), or (4) of this section, shall submit an initial emissions inventory (IEI) for any criteria pollutant or hazardous air pollutant (HAP) that has not been identified in a previous inventory. The IEI shall consist of actual emissions of VOC, NO_X, carbon monoxide (CO), sulfur dioxide (SO_2), lead (Pb), particulate matter of less than 10 microns in diameter (PM_{10}), any other contaminant subject to NAAQS, emissions of all HAPs identified in FCAA, §112(b), or any other contaminant requested by the commission from individual emission units within an account. For purposes of this section, the term "actual emission" is the actual rate of emissions of a pollutant from an emissions unit as it enters the atmosphere. The reporting year will be the calendar year or seasonal period as

designated by the commission. Reported emission activities must include annual routine emissions; excess emissions occurring during maintenance activities, including start-ups and shutdowns; and emissions resulting from upset conditions. For the ozone nonattainment areas, the inventory shall also include typical weekday emissions that occur during the summer months. For CO nonattainment areas, the inventory shall also include typical weekday emissions that occur during the winter months. Emission calculations must follow methodologies as identified in subsection (c) of this section.

(2) Statewide annual emissions inventory update (AEIU). Accounts meeting the applicability requirements during an inventory reporting period as identified in subsection (a)(1), (2), [or] (3), or (4) of this section shall submit an AEIU which consists of actual emissions as identified in subsection (b)(1) of this section if any of the following criteria are met. If none of the following criteria are met, a letter certifying such shall be submitted instead:

(A) any change in operating conditions, including start-ups, permanent shut-downs of individual units, or process changes at the account, that results in at least a 5.0% or 5 tpy, whichever is greater, increase or reduction in total annual emissions of VOC, NO_X, CO, SO_2, Pb, or PM_{10} from the most recently submitted emissions data of the account; or

(B) a cessation of all production processes and termination of operations at the account.

(3) Special inventories. Upon request by the executive director or a designated representative of the commission, any person owning or operating a source of air emissions which is or could be affected by any rule or regulation of the commission shall file emissions-related data with the commission as necessary to develop an inventory of emissions. Owners or operators submitting the requested data may make special procedural arrangements with the [Industrial] Emissions Assessment Section to submit data separate from routine emission inventory submissions or other arrangements as necessary to support claims of confidentiality.

(c) Calculations. Actual measurement with continuous emissions monitoring systems (CEMS) is the preferred method of calculating emissions from a source. If CEMS data is not available, other means for determining actual emissions may be utilized in accordance with detailed instructions of the commission. Sample calculations representative of the processes in the account must be submitted with the inventory.

(d) Certifying statement. A certifying statement, required by the FCAA, §182(a)(3)(B), is to be signed by the owner(s) or operator(s) and shall accompany each

emissions inventory to attest that the information contained in the inventory is true and accurate to the best knowledge of the certifying official.

(e) Reporting requirements. The IEI or subsequent AEIUs shall contain emissions data from the previous calendar year and shall be due on March 31 of each year or as directed by the commission. Owners or operators submitting emissions data may make special procedural arrangements with the [Industrial] Emissions Assessment Section to submit data separate from routine emission inventory submissions or other arrangements as necessary to support claims of confidentiality. Emissions-related data submitted under a special inventory request made under subsection (b)(3) of this section are due as detailed in the letter of request.

(f) Enforcement. Failure to submit emissions inventory data as required in this section shall result in formal enforcement action under Texas Water Code, Chapter 7 [the]. [TCAA, §382.082 and §382.088. In addition, the TCAA, §361.2225, provides for criminal penalties for failure to comply with this section.]

§101.27. Emissions Fees.

(a) Applicability. The owner or operator of an account that is required to obtain a federal operating permit as described in Chapter 122 of this title (relating to Federal

Operating Permits Program) shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. Each account will be assessed a separate emissions fee. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year that a fee is being assessed, a full emissions fee is due. If the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due.

(b) Self reported/billed information. Emissions/inspection fees information packets will be mailed to each account owner or operator prior to the fiscal year that a fee is due. The completed emissions/inspection fees basis form must be returned to the address specified on the emissions/inspection fees basis form within 60 calendar days of the date the agency sends the emissions fees information packet. The completed emissions/inspection fees basis form must include, at least, the company name, mailing address, site name, all commission identification numbers, applicable Standard Industrial Classification (SIC) category, the emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment. If more than one SIC category can apply to an

account, the category reported must be the one with the highest associated fee as listed in §101.24 of this title. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account owner or operator.

(c) Requesting fee information packet. If an account owner or operator has not received the fee information packet described in subsection (b) of this section by June 1 prior to the fiscal year that a fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year that a fee is due. For accounts that begin or resume operation after September 1, the owner or operator of the account shall request an information packet within 30 calendar days prior to commencing operation.

(d) Payment. Fees must be remitted by check, certified check, electronic funds transfer, or money order and sent to the address printed on the billing statement.

(e) Due date. Payment of the emissions fee is due within 30 calendar days of the date the agency sends a statement of the assessment to the account owner or operator.

(f) Basis for fees.

(1) The fee must be based on allowable levels or actual emissions at the account. For purposes of this section, allowable levels are those limits as specified in an

enforceable document such as a permit, certified registration of emissions, or Commission Order that are in effect during the fiscal year that a fee is due and actual emissions are the emissions of all regulated pollutants emitted from the account during the last full calendar year preceding the beginning of the fiscal year that a fee is due. Under no circumstances may the fee basis be less than the actual emissions at the account. The fee applies to the regulated pollutant emissions at the account, including those emissions from point and fugitive sources. The fee basis must include emissions during all operational conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities as described in Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000 tons of each regulated pollutant will be used for fee calculations. The fee for each fiscal year is set at the following rates.

(2) The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels or actual emissions for individual emission points or process units at the account rounded up to the nearest whole number, as follows.

(A) Where there is an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for

individual emission points or process units, the actual emissions from all individual emission points and process units at the account may be used to calculate the fee basis only if a complete and verifiable emissions [emission] inventory for the account is submitted as described in §101.10 of this title (relating to Emissions Inventory Requirements). Where a complete and verifiable emissions inventory is not submitted, the executive director may direct that the fee be based on all of the allowable levels for the account.

(B) Where there is not an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emissions points or process units; actual emissions from all individual emission points and process units must be used to calculate the fee basis. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and emission factors used in such calculations.

(3) For purposes of this section, the term "regulated pollutant" includes any volatile organic compound, any pollutant subject to Federal Clean Air Act (FCAA), §111, any pollutant listed as a hazardous air pollutant under FCAA, §112, each pollutant that a national primary ambient air quality standard has been promulgated (including carbon monoxide), and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders. For purposes of this

section, the term "regulated pollutant" does not include individual gases listed in the definition of greenhouse gases.

(g) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to remit the full emissions fee by the due date must result in enforcement action under Texas Water Code, §7.178. The provisions of this section, as first adopted and amended thereafter, are and must remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(h) Late payments. The agency shall impose interest and penalties on owners or operators of accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

SUBCHAPTER F: EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 1: EMISSIONS EVENTS

§101.201

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to

require submittal of information regarding emissions of air contaminants; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; THSC, §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events; THSC, §382.05102, concerning Permitting Authority of Commission; Greenhouse Gas Emissions, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.062, concerning Application, Permit and Inspection Fees, which authorizes the commission to charge these types of fees; and THSC, §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order. The amendment is also proposed under Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Prepatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. Additionally, the amendment is proposed under Federal Clean Air Act (FCAA), 42 United

States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, 382.0216, 382.05102, and 382.062; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§101.201. Emissions Event Reporting and Recordkeeping Requirements.

(a) The following requirements for reportable emissions events apply.

(1) As soon as practicable, but not later than 24 hours after the discovery of an emissions event, the owner or operator of a regulated entity shall:

(A) determine if the event is a reportable emissions event; and

(B) notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction, if the emissions event is reportable.

(2) The initial 24-hour notification for reportable emissions events, with the exception of emissions from boilers or combustion turbines referenced in the definition of reportable quantity (RQ) in §101.1 of this title (relating to Definitions) for each regulated entity, must at a minimum, identify for each emissions point with emissions that exceed an RQ:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the common name of the process units or areas, the common name of the facilities that incurred the emissions event, and the common name of the emission points where the unauthorized emissions exceeded an RQ were released to the atmosphere;

(D) the date and time of the discovery of the emissions;

(E) the estimated duration of the emissions;

(F) the compound descriptive type of the individually listed compounds or mixtures of air contaminants released during the emissions event, in the definition of RQ in §101.1 of this title that are known through common process knowledge, past engineering analysis, or testing to have equaled or exceeded the RQ;

(G) the estimated total quantities for those compounds or mixtures described in subparagraph (F) of this paragraph;

(H) the best known cause of the emissions event at the time of the initial 24-hour notification, if known; and

(I) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(3) The initial 24-hour notification for reportable emissions events for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title must identify for each emission point with excess opacity that exceeds the RQ by more than 15%:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the best known cause of the emissions event, if known at the time of notification;

(D) the common name of the process units or areas, the common name of the facilities that experienced the emissions event, and the common name of the emission points where the unauthorized opacity that exceeded the RQ occurred;

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration or expected duration of the emissions;

(G) the estimated opacity; and

(H) the actions taken, or being taken, to correct the emissions event and minimize the emissions.

(4) The owner or operator of a regulated entity experiencing a reportable emissions event that also requires an initial notification under §327.3 of this title (relating to Notification Requirements) may satisfy the initial 24-hour notification requirements of this section by complying with the requirements under §327.3 of this title.

(b) The owner or operator of a regulated entity experiencing an emissions event shall create a final record of all reportable and non-reportable emissions events as soon as practicable, but no later than two weeks after the end of an emissions event. Final records must be maintained on-site for a minimum of five years and be made readily available upon request to commission staff or personnel of any air pollution program with jurisdiction. If a regulated entity is not normally staffed, records of emissions events may be maintained at the staffed location within Texas that is responsible for the day-to-day operations of the regulated entity.

(1) The final record of a reportable emissions event must identify for all emission points involved in the emissions event:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number of the regulated entity experiencing an emissions event, if a Regulated Entity Number and air account number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the points at which emissions to the atmosphere occurred;

(D) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that experienced the emissions event, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the agency has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report.

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration of the emissions;

(G) the compound descriptive type of all individually listed compounds or mixtures of air contaminants in the definition of RQ in §101.1 of this title, from all emission points involved in the emissions event, that are known through common process knowledge or past engineering analysis or testing to have been released during the emissions event, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report, instead these compounds or mixtures of air contaminants may be identified together as "other";

(H) the estimated total quantities for those compounds or mixtures described in subparagraph (G) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, if any, governing the facilities involved in the emissions event; and the authorized emissions limits, if any, for the facilities involved in the emissions events, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title, which record only the authorized

opacity limit and the estimated opacity during the emissions event. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as "other" under subparagraph (G) of this paragraph, are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as "other";

(I) the basis used for determining the quantity of air contaminants emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(J) the best known cause of the emissions event at the time of reporting;

(K) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(L) any additional information necessary to evaluate the emissions event.

(2) Records of non-reportable emissions events must identify:

(A) the name of the owner or operator of the regulated entity experiencing an emissions event;

(B) the commission Regulated Entity Number and air account number of the regulated entity experiencing an emissions event, if a Regulated Entity Number and air account number exists, of if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(C) the physical location of the points at which emissions to the atmosphere occurred;

(D) the common name of the process units or areas, the common name and the agency-established facility identification number of the facilities that experienced the emissions event, and the common name and the agency-established emission point numbers where the unauthorized emissions were released to the atmosphere. Owners or operators of those facilities and emission points that the commission has not established facility identification numbers or emission point numbers for are not required to provide the facility identification numbers and emission point numbers in the report, but are required to provide the common names in the report;

(E) the date and time of the discovery of the emissions event;

(F) the estimated duration of the emissions;

(G) the compound descriptive type of the individually listed compounds or mixtures of air contaminants, in the definition of RQ in §101.1 of this title, from all emission points involved in the emissions event, that are known through common process knowledge or past engineering analysis, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title and that were unauthorized. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than ten pounds in a 24-hour period, are not required to be specifically listed in the report, instead these compounds or mixtures of air contaminants may be identified together as "other";

(H) the estimated total quantities and the authorized emissions limits for those compounds or mixtures described in subparagraph (G) of this paragraph; the preconstruction authorization number or rule citation of the standard permit, permit by rule, or rule, if any, governing the facilities involved in the emissions event; and the authorized emissions limits, if any, for the facilities involved in the emissions events, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of

this title, which record only the authorized opacity limit and the estimated opacity during the emissions event. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. Estimated emissions from compounds or mixtures of air contaminants that are identified as "other" under subparagraph (G) of this paragraph, are not required for each individual compound or mixture of air contaminants, however, a total estimate of emissions must be provided for the category identified as "other";

(I) the basis used for determining the quantity of air contaminants emitted, except for boilers or combustion turbines referenced in the definition of RQ in §101.1 of this title;

(J) the best known cause of the emissions event at the time of recording;

(K) the actions taken, or being taken, to correct the emissions event and minimize the emissions; and

(L) any additional information necessary to evaluate the emissions event.

(c) For all reportable emissions events, if the information required in subsection (b) of this section differs from the information provided in the initial 24-hour notification under subsection (a) of this section, the owner or operator of the regulated entity shall submit a copy of the final record to the commission office for the region in which the regulated entity is located and to appropriate local air pollution agencies with jurisdiction no later than two weeks after the end of the emissions event. If the owner or operator does not submit a record under this subsection, the information provided in the initial 24-hour notification under subsection (a) of this section will be the final record of the emissions event, provided the initial 24-hour notification was submitted electronically in accordance with subsection (g) of this section. Any emissions of greenhouse gases, individually or collectively, are not required to be submitted under this subsection, except for specific individual air contaminant compounds listed in the definition of reportable quantity.

(d) The owner or operator of a boiler or combustion turbine, as defined in §101.1 of this title, fueled by natural gas, coal, lignite, wood, or fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, that is equipped with a continuous emission monitoring system that completes a minimum of one operating cycle (sampling, analyzing, and data recording) for each successive 15-minute interval, and is required to submit excess emission reports by other state or federal requirements, is exempt from creating, maintaining, and submitting final records of reportable and non-reportable emissions events of the boiler or combustion turbine under subsections (b) and

(c) of this section if the notice submitted under subsection (a) of this section contains the information required under subsection (b) of this section.

(e) As soon as practicable, but not later than 24 hours after the discovery of an excess opacity event, as defined in §101.1 of this title, where the owner or operator was not already required to provide an initial 24-hour notification under subsection (a)(2) or (3) of this section, the owner or operator shall notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction. In the notification, the owner or operator shall identify:

(1) the name of the owner or operator of the regulated entity experiencing the excess opacity event;

(2) the commission Regulated Entity Number and air account number of the regulated entity experiencing an opacity event, if a Regulated Entity Number and air account number exists, or if there is not a Regulated Entity Number, the air account number of the regulated entity. If a Regulated Entity Number and air account number do not exist, then identify the location of the release and a contact telephone number;

(3) the physical location of the excess opacity event;

(4) the common name of the process units or areas, the common name of the facilities where the excess opacity event occurred, and the common name of the emission points where the excess opacity event occurred;

(5) the date and time of the discovery of the excess opacity event;

(6) the estimated duration of the excess opacity;

(7) the estimated opacity;

(8) the authorized opacity limit for the facilities having the excess opacity event;

(9) the best known cause of the excess opacity event at the time of the notification; and

(10) the actions taken, or being taken, to correct the excess opacity event.

(f) The owner or operator of any regulated entity subject to the provisions of this section shall perform, upon request by the executive director or any air pollution control agency with jurisdiction, a technical evaluation of each emissions event. The evaluation

must include at least an analysis of the probable causes of each emissions event and any necessary actions to prevent or minimize recurrence. The evaluation must be submitted in writing to the executive director and to the appropriate local air pollution agencies with jurisdiction within 60 days from the date of request. The 60-day period may be extended by the executive director. Additionally, the owner or operator of a regulated entity experiencing an emissions event must provide, in writing, additional or more detailed information regarding the emissions event when requested by the executive director or any air pollution control agency with jurisdiction, within the time established in the request.

(g) On and after January 1, 2003, notifications and reports required in subsection (c) of this section must be submitted electronically to the commission using the electronic forms provided by the commission. On and after January 1, 2004, notifications required in subsections (a) and (e) of this section must be submitted via commission's secure Web server, facsimile, or electronic mail to the commission using electronic forms provided by the commission. Notwithstanding the requirement to report initial 24-hour notifications electronically after January 1, 2004, the owner or operator of a regulated entity experiencing a reportable emissions event that also requires an initial notification under §327.3 of this title, is not required to report the event electronically under this subsection provided the owner or operator complies with the requirements under §327.3 of this title and in subsections (a) and (c) of this section. If the initial notification is not submitted by using an online form on the commission's secure Web server, the owner or operator must

submit the identical information on the commission's secure Web server within 48 hours of discovery of the event. In the event the commission's server is unavailable due to technical failures or scheduled maintenance, events may be reported via facsimile to the appropriate regional office. The commission will provide an alternative means of notification in the event that the commission's electronic reporting system is inoperative. Electronic notification and reporting is not required for small businesses that meet the small business definition in Texas Water Code, §5.135(g)(2) and to appropriate local air pollution control agencies with jurisdiction. Small businesses shall provide notifications and reporting by any viable means that meet the time frames required by this section.

(h) Annual emissions event reporting: beginning in calender year 2007, on or before March 31 of each calendar year or as directed by the executive director, each owner or operator of a regulated entity, as defined in §101.1 of this title that is subject to reporting under §101.10 of this title (relating to Emissions Inventory Requirements), and those that are not subject to reporting under §101.10 of this title, but are located in nonattainment, maintenance, early action compact areas, Nueces County, and San Patricio County, that experienced at least one emissions event during the calendar year shall report to the executive director, and all appropriate local air pollution control agencies with jurisdiction, the following:

(1) the total number of reportable and the total number of non-reportable emissions events experienced at the regulated entity;

(2) the estimated total quantities for all compounds or mixtures of air contaminants, by compound or mixture, in the definition of RQ in §101.1 of this title that, by facility, were emitted during emissions events at the regulated entity. Compounds or mixtures of air contaminants, that have an RQ greater than or equal to 100 pounds and the amount released is less than one pound in a 24-hour period, are not required to be included in the report. Good engineering practice and methods must be used to provide reasonably accurate representations for emissions and opacity. This paragraph does not apply to boilers and combustion turbines referenced in the definition of RQ in §101.1 of this title that must report only the estimated opacities during emissions events and duration of unauthorized opacity; and

(3) owners and operators of regulated entities that are not subject to reporting under §101.10 of this title must provide annual emissions event reporting electronically by using an online form on the commission's secure Web server. The commission will provide an alternative means of reporting in the event that the commission's electronic reporting system is inoperative. If the commission's server is unavailable due to technical failures or scheduled maintenance, the annual reports may be provided through alternative means to the executive director. Annual electronic reporting

is not required for small businesses that meet the small business definition in Texas Water Code, §5.135(g)(2) and to appropriate local air pollution control agencies with jurisdiction. Small businesses shall provide annual reporting by any viable means that meet the time frames required by this section.

(4) owners and operators of regulated entities that are subject to reporting under §101.10 of this title must provide the information required by this subsection as part of their reporting under §101.10 of this title.

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §106.2 and §106.4.

If adopted, the commission will submit §106.2 and §106.4 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel

economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3,

2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit

revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG

pollutants).

House Bill (HB) 788, 83rd Legislature, 2013 added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and

FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116 and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and the lifting of the FIP.

The commission's proposed strategy for authorization of emissions of GHGs under the NSR program is that emissions above the thresholds established in proposed §116.164(a) must be authorized by PSD permits. EPA does not consider emissions lower than the tailored thresholds to be defined as subject to regulation and EPA does not require authorization of these emissions. Thus, the commission is proposing rule language that will comply with the specific intent of HB 788 to authorize emissions of GHGs only to the extent required under federal law. No emissions of GHGs may be authorized by any Permit

by Rule (PBR) under Chapter 106 or standard permit under Chapter 116, Subchapter F, however emissions of non-GHGs at the same facility may be authorized under this chapter or Chapter 116.

Section by Section Discussion

§106.2, Applicability

The commission proposes to amend §106.2 to establish that Chapter 106 does not apply to emissions of GHGs (as defined in proposed amendment to §101.1). Emissions of GHGs would not be authorized under PBRs; these emissions would be authorized by PSD permit if any of the applicability conditions in proposed new §116.164 are met. However, PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

§106.4, Requirements for Permitting by Rule

The commission proposes several revisions to §106.4 in order to address the use of PBRs for authorization of emissions of non-GHGs at sources which emit GHGs. The commission's intent is to ensure that PBRs remain a valid method of authorization for emissions of non-GHGs at facilities and projects which emit GHGs. Emissions of GHGs themselves will be authorized under a PSD permit, if the emissions meet or exceed the tailored thresholds. This is consistent with federal law.

The commission proposes to restructure §106.4(a)(1) into subparagraphs (A) - (E) in order

to improve the readability and clarify the various emission limitations in this paragraph.

The commission proposes to add rule language that excepts GHGs from the emission limits in §106.4 and removes the terms carbon dioxide and methane from this section. These two gases are proposed to be removed from this section because carbon dioxide and methane are included in the proposed new definition of GHGs. Section 106.4(a) places limits on actual emissions authorized under PBR. Because GHGs would not be authorized under PBR, it is not necessary to include GHGs on the list of emission limits. While the commission is proposing to remove the terms carbon dioxide and methane this amendment would not affect how PBRs function, as GHGs will not be subject to an emission limit under §106.4(a), which is the current practice.

The proposed amendment is necessary to ensure that a project or facility will not be ineligible for a PBR solely because of emissions of GHGs.

The commission also proposes to amend §106.4(a)(3) to specify that projects and facilities which trigger PSD permit requirements due solely to emissions of GHGs are not excluded from using an applicable PBR to authorize the non-GHGs pollutants associated with the project or facility. In such a case, all applicable PSD requirements relating to the emissions of GHGs must be satisfied, and the emissions of non-GHG pollutants and facility parameters must meet all applicable PBR conditions, including §106.4 requirements.

Projects and facilities which trigger PSD requirements due to emissions of non-GHGs pollutants cannot qualify for a PBR.

Additionally, the commission proposes to add language which establishes that facilities or projects which require a PSD permit due to emissions of GHGs may not commence construction or operation until the PSD permit is issued. This amendment is necessary because many PBRs do not require registration or approval prior to construction, and therefore the PBR authorization may be available prior to issuance of the PSD GHG permit.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will not have any fiscal implications for other state agencies or units of local government.

The proposed rules would amend Chapter 106 to implement the requirements of HB 788, 83rd Legislature, 2013, and are part of a larger rulemaking involving Chapters 39, 55, 101, 116, and 122. This fiscal note only addresses the proposed rules for Chapter 106.

HB 788 requires the agency to adopt rules that allow it to permit emissions of GHGs to the

extent required by federal law. Under the proposed rules, major emissions of GHGs will be subject to the state's PSD permit program. The proposed rules also clarify that emissions of GHGs will not be permitted under Chapter 106. The agency expects that some small and medium-sized facilities, with emissions currently authorized by PBRs, will be subject to the PSD program because of emissions of GHGs. The amended language to Chapter 106 clarifies that some of these facilities can continue to be authorized for minor source emissions of non-GHGs under a PBR even though emissions of GHGs may trigger a requirement for a PSD permit.

The proposed rules clarify that PBRs will not apply to emissions of GHGs and, to the extent federal PSD regulations allow, that other emissions can continue to be authorized by a PBR if the non-GHG emissions meet the requirements of the PBR. The proposed rules will not have a fiscal impact on governmental entities, individuals, or business entities since they are clarifying in nature and do not delete any current PBR regulations or impose new ones. Currently, governmental entities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on governmental entities are expected due to the proposed changes to Chapter 106.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules

are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and clarification of PBR rules concerning GHGs.

The proposed rules clarify that PBRs will not apply to emissions of GHGs and that other emissions can continue to be authorized by a PBR, to the extent allowed under federal PSD regulations. The proposed rules will not have a fiscal impact on governmental entities, individuals, or business entities since they are clarifying in nature and do not delete any current PBR regulations or impose new ones. Currently, facilities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on individuals or businesses are expected due to the proposed changes to Chapter 106.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Currently, small businesses with facilities that emit GHGs are subject to federal law and EPA review to authorize those emissions. The proposed rules will facilitate a transition to an authorization process by the agency for GHGs, and no additional fiscal impacts on individuals or businesses are expected due to the proposed changes to Chapter 106. The proposed rules do not delete any current PBR regulations or impose any new ones.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal and state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the

environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions to Chapter 106 is to implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing

adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This proposed rulemaking is in conjunction with changes to other chapters in 30 TAC that are necessary to implement provisions in HB 788. The intent of the legislation is to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the

bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the proposed rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permit from EPA and the proposed rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the proposed rules fall under the exception in Texas

Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the

standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs. This rulemaking is one of several concurrent rulemakings that will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the proposed revisions to Chapter 106 implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

The proposed rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA) and the Texas Water Code), which are cited in the Statutory Authority section of this preamble. Further, the proposed rules do not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this proposed rulemaking action is not subject to the

regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action

under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the proposed revisions to Chapter 106 would ensure that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency

with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules amend and update rules that govern the applicability of the PSD program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rules, if adopted, will not require any revisions to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER A: GENERAL REQUIREMENTS

§106.2, §106.4

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC,

§382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities determined to not make a significant contribution of air contaminants in the atmosphere; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The new section and amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement HB 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, and 382.05196; Texas Government Code, §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§106.2. Applicability.

This chapter applies to certain types of facilities or changes within facilities listed in this chapter where construction is commenced on or after the effective date of the relevant

permit by rule. This chapter does not apply to emissions of greenhouse gases (as defined in §101.1 of this title (relating to Definitions)).

§106.4. Requirements for Permitting by Rule.

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed the following limits, as applicable:

(A) 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_X); [or]

(B) 25 tpy of volatile organic compounds (VOC), [or] sulfur dioxide (SO_2), or inhalable particulate matter (PM); [or]

(C) 15 tpy of particulate matter with diameters of 10 microns or less (PM_{10}); [or]

(D) 10 tpy of particulate matter with diameters of 2.5 microns or less ($PM_{2.5}$); or

(E) 25 tpy of any other air contaminant except:

(i) [carbon dioxide,] water, nitrogen, [methane] ethane, hydrogen, and oxygen; and [.]

(ii) greenhouse gases as specified in §106.2 of this title (relating to Applicability).

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), or any modification which constitutes a major modification, as defined in §116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in 40 Code of Federal Regulations (CFR) §52.21, or any change which constitutes a major modification, as defined in 40 CFR §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder because of emissions of air contaminants other than greenhouse gases, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter. A new major stationary source or major modification which is subject to Chapter 116, Subchapter B, Division 6 of this title due solely to emissions of greenhouse gases may use a permit by rule under this chapter for air contaminants that are not greenhouse gases. However, facilities or projects which require a prevention of significant deterioration permit due to emissions of greenhouse gases may not commence construction or operation until the prevention of significant deterioration permit is issued.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or PM; or 15 tpy of PM_{10}; or 10 tpy of $PM_{2.5}$; or 25 tpy of any other air

contaminant except [carbon dioxide,] water, nitrogen, [methane,] ethane, hydrogen, [and] oxygen, and GHGs (as specified in §106.2 of this title).

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, §111 (Federal New Source Performance Standards) and §112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_X if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with Texas Health and Safety Code [TCAA], §382.113 and any other applicable law.

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §§116.164, and 116.169.

If adopted, the commission will submit the amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §§116.164, and 116.169 to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal*

Register (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) requirements under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this

new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to

EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring

Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other

pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013 added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code (TWC), Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if, at a future date, emissions of GHG are no longer required to be authorized under federal law.

The commission is initiating this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the

preferred authority for emissions of {GHGs}.

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing revisions to Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Section by Section Discussion

§116.12, Nonattainment and Prevention of Significant Deterioration Definitions

The commission proposes to amend §116.12 to add the definitions of carbon dioxide equivalent (CO_2e) emissions and the pollutant GHGs. The commission proposes

amendments to the definitions of federally regulated NSR pollutant, major stationary source, and major modification.

The proposed definition of GHGs references the proposed definition in §101.1(42), Definitions, and establishes that the regulated pollutant GHGs is an aggregate group of six greenhouse gases including: carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. This proposed definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48)(i). Other gases that are considered greenhouse gases are not included in the definition of the pollutant GHGs.

The proposed definition in §116.12(7) of CO_2e emissions is consistent with EPA's definition in 40 CFR §51.166(b)(48)(ii). The new definition is necessary to establish the threshold for sources to be considered major for GHGs, consistent with EPA's Tailoring Rule. The CO_2e emissions are determined by multiplying the mass amount in tons per year (tpy) of emissions of each of the gases (that are included in the definition of the pollutant of GHGs) by the global warming potential (GWP) of the gas, and adding the results. The GWPs are published in the 40 CFR Part 98, Subpart A, Table A-1 - Global Warming Potentials. For example, a source emits 5 tpy CO_2, 25 tpy of CH_4, and 10 tpy of

the hydroflourcarbon trifluoromethane (CHF_3). The GWP of CO_2e is 1, the GWP of CH_4 is 21, and the GWP of CHF_3 is 11,700. The CO_2e of the source would be 117,530 tpy CO_2e. This value is reached by multiplying 5 tpy CO_2 times 1, 21 tpy CH_4 by 25, and 10 tpy CHF_3 by 11,700, then adding each result to total 117,530 tpy CO_2e.

The proposed definition of CO_2e emissions includes EPA's deferral for CO_2 emissions from bioenergy and other biogenic sources as published in the July 20, 2011, issue of the *Federal Register* (76 FR 43490). This deferral established that biogenic CO_2 emissions are not required to be counted for applicability purposes under the PSD program until July 21, 2014. EPA committed to conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources during the deferral period. In the meantime, certain CO_2 emissions from the combustion or decomposition of non-fossilized and biodegradable organic material are not required to be included in the total mass of CO_2 used to determine CO_2e emissions. For example, CO_2 generated from the combustion of biogas collected from (or the biological decomposition of) waste in landfills, wastewater treatment, or manure management processes is not required to be included in the calculation of CO_2e emissions. Also exempted is CO_2 generated from the following: fermentation during ethanol production; combustion of the biological fraction of municipal solid waste or biosolids; combustion of the biological fraction of tire-derived fuel; and combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material. Additional information regarding

the deferral for biogenic sources is available on EPA's Web site *http://www.epa.gov/climatechange/ghgemissions/biogenic-emissions.html*.

The proposed amendment to the definition of federally regulated NSR pollutant in §116.12(15) will establish GHGs emitted over the federal Tailoring Rule thresholds as a pollutant subject to Texas' PSD permitting program.

Sources that emit GHGs are only subject to the PSD permitting program if they meet or exceed the thresholds proposed in new §116.164, Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.

The proposed new definition if GHGs in §116.12(16) establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: CO_2, N_2O, CH_4, HFCs, PFCs, and CF_6. This proposed definition is consistent with EPA's definition in 40 CFR §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are commonly considered GHGs are not included in the definition of the pollutant GHGs.

The proposed amendment to the definition of major stationary source and major modification (in §116.12(19) and (20), respectively) reference proposed new §116.164 in

order to simplify understanding of the thresholds established specifically for GHGs.

The commission also proposes clarifying amendments to §116.12 including renumbering to accommodate the proposed new definitions; deleting the sentence, "The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas" because the definitions apply in attainment areas as well; and clarifying the title and citation of a referenced section in the foot note to Table I - Major Source/Major Modification Emission Thresholds.

§116.111, General Application

The commission proposes to amend §116.111 to add subsection (a)(2)(I)(ii) to establish the requirement to obtain authorization under the PSD permitting program for sources of GHGs which meet the thresholds proposed in new §116.164. The proposed amendment is necessary because the existing language in subparagraph (I) only requires PSD review in attainment areas. The proposed amendment clarifies that authorization of GHGs above the tailored thresholds is required statewide. The proposed amendment includes relettering subparagraph (I) to accommodate the two conditions which require PSD review. Consistent with current practice, the commission intends to issue a separate PSD GHG permit.

§116.160, Prevention of Significant Deterioration Requirements

The commission proposes to amend subsection (a) to require that new major sources of GHGs or major modifications of GHGs comply with the requirements of the PSD permitting program regardless of the location of the sources. The PSD permitting requirements are proposed to be statewide because there is no NAAQS for GHGs. This is consistent with the federal PSD permitting regulations.

The proposed amendment to subsection (a) will result in the applicable PSD requirements applying to sources that emit GHGs above the thresholds in proposed §116.164. The federal PSD rules, like the preconstruction requirements in the THSC, require a best available control technology (BACT) determination and a health impacts analysis. As EPA's guidance on PSD permitting for GHGs indicates, the focus of the application review is on the control technology choice. EPA has recognized that the unique nature of emissions of GHGs and impacts present challenges to permitting authorities conducting PSD review for these emissions. For instance, EPA has indicated that no air quality analysis is required for PSD permits. In "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) prepared by EPA's Office of Air Quality Planning and Standards, EPA stated that, "...monitoring for GHGs is not required because EPA regulations provide an exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) for pollutants that are not listed in the appropriate section of the regulations, and GHGs are not currently included in that list. However, 40 CFR

§52.21(m)(1)(ii) and §51.166(m)(1)(ii) of EPA's regulations apply to pollutants for which no NAAQS exists. These provisions call for collection of air quality monitoring data 'as the Administrator determines is necessary to assess ambient air quality for that pollutant in any (or the) area that the emissions of that pollutant would affect.' In the case of GHGs, the exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) is controlling since GHGs are not currently listed in the relevant paragraph. Nevertheless, EPA does not consider it necessary for applicants to gather monitoring data to assess ambient air quality for GHGs under 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii), or similar provisions that may be contained in state rules based on EPA's rules. GHGs do not affect "ambient air quality" in the sense that EPA intended when these parts of EPA's rules were initially drafted." A NAAQS for GHGs has not been established due to the extreme difficulty in determining what concentration level is requisite to protect public health and welfare. The uniformity of GHG concentrations throughout the ambient air also make localized impacts determinations problematic. Considering the nature of emissions of GHGs and their global impacts, EPA stated that it is not "practical or appropriate to expect permitting authorities to collect monitoring data for purpose of assessing ambient air impacts of GHGs."

Furthermore, consistent with EPA's statement in the Tailoring Rule, EPA stated, "...it is not necessary for applicants or permitting authorities to assess impacts from GHGs in the context of the additional impacts analysis or Class I area provisions of the PSD

regulations for the following policy reasons. Although {it is EPA's position that emissions of GHGs} contribute to global warming and other climate changes that result in impacts on the environment, including impacts on Class I areas and soils and vegetation due to the global scope of the problem, climate change modeling and evaluations of risks and impacts of emissions of GHGs is typically conducted for changes in emissions orders of magnitude larger than the emissions from individual projects that might be analyzed in PSD permit reviews. Quantifying the exact impacts attributable to a specific GHGs source obtaining a permit in specific places and points would not be possible with current climate change modeling. Given these considerations, emissions of GHGs would serve as the more appropriate and credible proxy for assessing the impact of a given facility. Thus, EPA believes that the most practical way to address the considerations reflected in the Class I area and additional impacts analysis is to focus on reducing emissions of GHGs to the maximum extent. In light of these analytical challenges, compliance with the best available control technology analysis is the best technique that can be employed at present to satisfy the additional impacts analysis and Class I area requirements of the rules related to GHGs. "TCEQ intends to implement the PSD GHG permitting requirements consistent with the EPA's recognition of the unique nature of emissions of GHGs. The "PSD and Title V Permitting Guidance for Greenhouse Gases," (EPA-457/B-11-001 March 2011) guidance is available on the EPA's Web site: *http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf*.

Further, because GHG emissions are typically non-toxic, relatively inactive and nonflammable, concentrations of GHGs high enough to produce health effects are extremely unlikely to be found in ambient air. Therefore, while health effects of GHG emissions will be evaluated consistent with the preceding statement when determining issuance of a PSD GHG permit, modeling or additional impacts review of GHGs will not be conducted as part of the review of an application for a PSD GHG permit. In addition, it is not necessary to review individual emissions of GHGs for purposes of global effects on the climate because no numerical standard exists. As discussed elsewhere in this preamble, this is because of the inherent difficulty in determining: 1) the appropriate concentration level as well as; 2) localized impacts because of the uniformity of GHG concentrations throughout the ambient air. The impacts review for individual air contaminants will continue to be addressed, as applicable, in the state's traditional minor and major NSR permits program per Chapter 116.

The commission proposes subsection (b)(2) to include references to the netting requirements for applicability thresholds in §116.164 for GHGs. The proposed amendment establishes the emission netting thresholds for GHGs which may cause an existing source to become subject to the PSD permitting program when the source is undergoing a modification. The subsection is proposed to be relettered to clarify that the *de minimis* threshold test (netting) includes the threshold for GHGs on mass basis and CO_2e emissions for modifications of emissions of GHGs.

The commission proposes the amendment to subsection (c) to clarify that emissions of GHGs have the threshold specified in proposed new §116.164.

§116.164, Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources

The commission proposes new §116.164 to establish the specific PSD permitting major source thresholds for emissions of GHGs. Consistent with EPA's Tailoring Rule, emissions of GHGs at sources that emit or will emit GHGs must be evaluated on a mass basis and as CO_2e emissions. In proposed new subsection (a), there are five circumstances which will require a source to conduct PSD review for emissions of GHGs. Two are considered by EPA as "anyway sources" or "anyway modifications" because they are subject to PSD permitting due to emissions of a regulated NSR pollutant that is not GHGs. In the proposed rule language these two categories are §116.164(a)(1) and (2), respectively. Two categories are considered by EPA as "non-anyway sources" and "non-anyway modifications" because they are not subject to PSD permitting for a regulated NSR pollutant other than GHGs. In the proposed rule language these categories are §116.164(a)(3) and (4), respectively. These sources will become subject to PSD permitting for GHGs as discussed in this preamble. The final category is existing sources that are not major for any pollutants. In the proposed rule language this category is in §116.164(a)(5).

EPA's approach to regulating GHGs is that the emissions of GHGs (on a mass basis) must first meet or exceed the definition of a "major stationary source" in 40 CFR §52.21(b)(1)(i) (for EPA and delegated state air permit programs) or 40 CFR §51.166(b)(1)(i) (for approved state air permit programs). The Tailoring Rule established that emissions of CO_2e must meet or exceed the tailored thresholds established in the federal definition of "subject to regulation" in 40 CFR §52.21(b)(49) and §51.166(b)(48). EPA details this approach in the preamble for the Tailoring Rule, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31523 and 31524), and page 9 of EPA's guidance (EPA-457/B-11-001 March 2011, PSD and Title V Permitting Guidance for Greenhouse Gases), available on EPA's Web site: *http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf*.

The EPA evaluated potential streamlining mechanisms as part of Step 3 of the Tailoring Rule. The commission intends to explore options to efficiently process PSD GHG applications. The commission has existing authority to establish a streamlined application review and permit issuance process for groups of sources, such as sources that belong to the same industrial source category, or that have common processes and equipment. The executive director has researched streamlining options presented in the FCAA Advisory Committee GHG Permit Streamlining Workgroup Final Report, available on EPA's Web site:

http://www.epa.gov/nsr/ghgdocs/20120914CAAACPermitStreamlining.pdf. The commission will work with stakeholders during implementation of the PSD GHG permitting program to identify and develop appropriate streamlining options.

Proposed §116.164(a)(1)

The first circumstance proposed in §116.164(a)(1) is a new major stationary source subject to the PSD permitting program because of emissions of one or more pollutants that are not GHGs. EPA calls this category "new anyway sources" because these are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources will become subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule (effective January 2, 2011) under 40 CFR §51.166(b)(48)(iv)(a). Additional information on this category can be found in Appendix A and in Table II-A, Summary of PSD Applicability Criteria for New Sources of GHGs, in EPA's guidance.

These sources must include GHGs in the PSD review if the source emits or has the potential to emit 75,000 tpy of CO_2e or more. For example, a new source is proposed that will have the potential to emit: 300 tpy of volatile organic compounds (VOC); 5,000 tpy CO_2; and 4,500 tpy CH_4. Under the existing PSD permitting program in Texas, this source is subject to PSD permitting because its emissions of VOC exceed the major source threshold in 40 CFR §51.166(b)(1). In addition, the emissions of GHGs must be

evaluated against the threshold in proposed §116.164(a)(1) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 99,500 tpy CO_2e (multiply 5,000 tpy CO_2 by the GWP of 1, multiply 4,500 tpy CH_4 by the GWP of 21, and add the two results to get 99,500 tpy CO_2e). This source would be required to include emissions of GHGs in the PSD review because the source would emit greater than or equal to 75,000 tpy CO_2e.

Proposed §116.164(a)(2)

The second circumstance proposed in §116.164(a)(2) is an existing major stationary source subject to the PSD permitting program because of emissions of a pollutant(s) that are not GHGs. EPA calls these "anyway modifications." These are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources will become subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule under 40 CFR §51.166(b)(48)(iv)(b) when these sources will have a modification that results in an emissions increase of a regulated NSR pollutant and an emissions increase of CO_2e as defined in 40 CFR §51.166(b)(48)(iii). Because an emission rate for GHGs is not listed in 40 CFR §51.166(b)(23)(i), any GHGs emission rate greater than zero on a mass basis is considered significant, according to 40 CFR §51.166(b)(23)(ii). The modification must also meet the tailored threshold of 75,000 tpy CO_2e or more in 40 CFR §51.166(b)(48)(iv)(b). Therefore, if the project causes a significant net emissions increase for a non-GHG pollutant, then the project is a major

modification for GHGs only if it also results in a net emissions increase for GHGs at or above the threshold in proposed 40 CFR §51.166(b)(48)(iv)(b) as well. Additional information on this category can be found in Appendix C and in Table II-B, Summary of PSD Applicability Criteria for Modified Sources of GHGs, in EPA's guidance.

When the existing source has a major modification (as defined in §116.12) of a pollutant(s) that is not GHGs, the source must include GHGs in the PSD review if there is also a net emissions increase equal to or greater than 75,000 tpy CO_2e. For example, an existing source major for PSD permitting is proposing changes in operation that would have the potential to emit net increases of: 450 tpy of nitrogen oxides (NO_X), 150 tpy of carbon monoxide (CO); 7,000 tpy CO_2; and 3,800 tpy CH_4. Under the existing PSD permitting program in Texas, this action meets the definition of a major modification for NO_X and CO, and those pollutants are subject to PSD review. In addition, the emissions of GHGs must be evaluated against the threshold in proposed §116.164(a)(2) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 86,800 tpy CO_2e (multiply 7,000 tpy CO_2 by the GWP of 1, multiply 3,800 tpy CH_4 by the GWP of 21, and add the two results to get 86,800 tpy CO_2e). This source would be required to include emissions of GHGs in the PSD review because the action meets the definition of a major modification in §116.12 for a federally regulated NSR pollutant that is not GHGs, and there would be a net emission increase of GHGs that exceeds zero tpy GHGs on mass basis, and 75,000 tpy CO_2e or more, as established

in proposed new §116.164(a)(2).

In another example for the second circumstance, an existing source major for PSD permitting (for non-GHGs) is proposing changes in operation that would have the potential to emit net increases of 35 tpy NO_X, 15 tpy CO, 1,000 tpy CO_2, and 3,700 tpy CH_4. The net emission increases of NO_X and CO do not meet the definition of a major modification in §116.12 because the proposed potential emissions of both NO_X and CO are below the significant levels in 40 CFR §51.166(b)(23). While the CO_2e emissions of the proposed modification are 78,700 tpy CO_2e, which is over the significant threshold in proposed §116.164, the emissions of GHGs are not subject to PSD review for this action because the source is not also undergoing a major modification for a federally regulated NSR pollutant that is not GHGs.

Proposed §116.164(a)(3)

The third circumstance proposed in §116.164(a)(3) is a new stationary source that is major for GHGs only (these sources are minor for all non-GHGs pollutants). EPA calls these "non-anyway sources" because they are subject to PSD only because of emissions of GHGs. These sources will become subject to PSD permitting for GHGs as a result of Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(a). Additional information on this category can be found in Appendix B and in Table II-A in EPA's guidance.

These sources will be subject to the PSD permitting program for only GHGs if both the mass basis emissions of GHGs and the CO_2e emissions meet or exceed the thresholds in proposed §116.164(a)(3). These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO_2e. If both of the thresholds are met, the source is subject to the PSD permitting program solely because of emissions of GHGs.

For example, a new proposed source would have the potential to emit 35 tpy NO_X, 20 tpy CO, 500 tpy CO_2, and 6 tpy of the hydroflurocarbon nitrogen trifluoride (NF_3) (the GWP for NF_3 is 17,200). The emissions of NO_X and CO are not over the major source thresholds for those pollutants. The mass basis for GHGs would be 506 tpy, which exceeds the 250 tpy threshold. The CO_2e emissions would be 103,700, which exceeds the 100,000 tpy threshold. This new source would be subject to PSD permitting solely because of emissions of GHGs. Since this source is not major for any pollutant other than GHGs (the emissions of NO_X and CO are not over the significant thresholds in 40 CFR §51.166(b)(23)), only the GHGs are subject to PSD review. All other pollutants would be subject to appropriate minor source authorization.

In another example for the third circumstance, a proposed new source would have the potential to emit 45 tpy NO_X, 15 tpy CO, 90 tpy CO_2, and 6 tpy NF3. The emissions of

NO_X and CO are below the major source thresholds. The mass basis of emissions of GHGs is 96 (90 tpy CO_2 plus 6 tpy NF_3). While the CO_2e emissions are 103,290 tpy CO_2e, the source is not considered major for GHGs because the mass basis is not over the threshold of 100 tpy GHGs if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHG if the source is not on the list. Both the mass basis threshold and the tailored CO_2e threshold must be met or exceeded for the source to be considered a major source and subject to the PSD permitting program.

Proposed §116.164(a)(4)

The fourth circumstance, proposed in new §116.164(a)(4), is an existing stationary source that is major for GHGs and is proposing a major modification for GHGs. EPA calls these "non-anyway modifications." These sources will become subject to PSD permitting for GHGs in Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(b). These are existing sources that emit or have the potential to emit over the major source thresholds for GHGs. When the source will make changes that result in a net increase in emissions of GHGs above zero on a mass basis and greater than or equal to the tailored threshold of 75,000 tpy CO2e in 40 CFR §51.166(b)(48)(v)(b), it becomes subject to PSD permitting. As previously noted, because GHGs are not listed in 40 CFR §51.166(b)(23)(i), any emission rate greater than zero is considered significant according to 40 CFR §51.166(b)(23)(ii). Additional information on this category can be found in

Appendix D and in Table II-B in EPA's guidance.

These sources are existing major sources of GHGs if two thresholds are met or exceeded: the mass basis emissions of GHGs meet or exceed the defined threshold, and CO_2e meets or exceeds the tailored threshold. These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO_2e. These existing major sources are subject to the PSD permitting program when there is a physical change or change in method of operation that results in a net emissions increase of greater than zero tpy GHGs on a mass basis and greater than or equal to 75,000 tpy CO_2e. In the following example, an existing source is authorized to emit the following: 50 tpy NO_X, 30 tpy CO, 45 tpy SO_2, 5,000 tpy CO_2, 250 tpy CH_4, and 4 tpy SF_6. The source is currently a minor source in regard to criteria pollutants; however, the source is an existing major source in regard to GHGs. This is because the source currently has the potential to emit 5,000 tpy CO_2, 250 tpy of CH_4, and 4 tpy of SF_6. The total mass basis is 5,254 tpy GHGs. The GWP of CO2 is 1, CH_4 is 21, and SF_6 is 23,900, so the source emits or has the potential to emit 105,850 tpy CO_2e emissions. Both the mass basis and tailored GHGs thresholds are exceeded. This source is considered a major stationary source for GHGs. If the source proposes a change in operation that affects emissions of GHGs, the next step would be to calculate the proposed net emissions increases that will result from the proposed change in operation.

If the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO_2e, then the emissions of GHGs will be subject to PSD review as part of a major modification.

In another example of the fourth circumstance, an existing source is authorized to emit the following: 500 tpy SO_2, 95,000 tpy CO_2, and 250 tpy CH_4. The source is currently a major source of SO_2 and GHGs. This source is proposing changes in operation that would have the potential to emit net increases of: 15 tpy SO_2, 70,000 tpy CO_2; and 500 tpy methane. The netted emission increases of SO_2 does not meet the definition of a major modification in §116.12 because the proposed potential emissions of SO_2 are below the significant levels in 40 CFR §51.166(b)(23). However, because the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO_2e (80,500 tpy CO_2e in this example), then the emissions of GHGs would be subject to PSD review as a major modification.

Proposed §116.164(a)(5)

The fifth circumstance in proposed §116.164(a)(5) is an existing minor stationary source with emissions below the major source thresholds for all pollutants. This category of sources was not specifically addressed by EPA in the Tailoring Rule, however, an existing minor source that has a physical change or change in the method of operation that would constitute a major stationary source in and of itself is considered a new major stationary

source and subject to PSD according to 40 CFR §51.166(b)(1)(i)(C). Additional information on this category can be found in Appendix D and Table II-B in EPA's guidance.

For example, the source has the potential to emit 20 tpy NO_X, 10 tpy CO, 0.5 tpy SO_2, and 90 tpy CO_2. The emissions of GHGs for this source are below both the mass basis threshold of 250 tpy (or 100 tpy if the source is on the named source category list), and under the tailored 100,000 tpy CO_2e threshold. The emissions of GHGs from this source would become subject to the PSD permitting program if the source proposed a change that would result in an emissions increase greater than or equal to 100,000 tpy CO_2e, and greater than or equal to 250 tpy GHGs (or 100 tpy GHGs, if the source is listed on the named source category list).

Proposed §116.164(b)

The commission is proposing new §116.164(b) to clarify that emissions of GHGs at a new or modified facility that are below the thresholds in EPA's Tailoring Rule, as described by the conditions in proposed §116.164(a), do not require preconstruction authorization, consistent with HB 788 and EPA's interpretation of PSD GHG permitting requirements. This proposed amendment is appropriate because EPA does not consider emissions lower than the tailored thresholds to be defined as subject to regulation and EPA does not require authorization of these emissions. The Texas Clean Air Act (TCAA) allows the

commission to develop rules to establish a level of emissions for groups of facilities that do not require preconstruction authorization. In addition, emission increases below those thresholds resulting from a change at an existing permitted facility are not defined as a modification that requires preconstruction authorization under the TCAA. In order to demonstrate that emissions of GHGs from new or modified facilities or sources will not trigger PSD review, owners or operators must keep sufficient records to demonstrate authorization is not required for these GHG emissions. The commission intends to develop guidance to help smaller sources determine the type of records that are necessary to demonstrate compliance with this subsection. Sources will continue to be required to seek authorization for emissions from new or modified sources that are not GHGs.

§116.169, Greenhouse Gas Transition

The commission proposes new §116.169 to fulfill requirements established in HB 788. Proposed subsection (a) provides for the transition of certain PSD permitting applications which were previously submitted to EPA. Once EPA approves the SIP revisions and rescinds the FIP, the commission will accept the transfer of and review applications. The commission will work with EPA and applicants to determine if the commission or EPA will complete review of the application and issuance of a PSD GHG permit. Based on these discussions, TCEQ expects EPA will retain PSD permit implementation authority for those specific sources that have submitted PSD GHG

applications to EPA, but for which final agency action or the exhaustion of all administrative and judicial appeals processes have not yet been concluded or completed upon the effective date of EPA's final SIP approval of the new and amended sections in this chapter and rescission of the FIP.

§116.610, Applicability

The commission proposes to amend §116.610(a)(1) and (b) to clarify that sources of GHGs may use standard permits to authorize emissions of pollutants that are not GHGs. GHGs will not be authorized under standard permits. Instead, emissions of GHGs which meet or exceed the thresholds set in the EPA's Tailoring Rule are subject to the PSD permitting program. Sources subject to the PSD permitting program solely because of emissions of GHGs may continue to utilize standard permits to authorize emissions of pollutants that are not GHGs, in conjunction with a PSD permit that authorizes GHGs. Projects which trigger PSD requirements due to emissions of non-GHGs cannot qualify for a standard permit.

§116.611, Registration to Use a Standard Permit

The commission proposes to amend §116.611. Section §116.611(b) currently allows a source to begin construction 45 days after the executive director receives the registration for a standard permit. The proposed amendment to subsection (b) clarifies that sources which are subject to the PSD permitting program solely because of emissions of GHGs,

and using a standard permit to authorize emissions of pollutants that are not GHGs, may not begin construction until the source is issued a PSD GHG permit.

The commission proposes to amend subsection (c) to establish a deadline for sources that are currently operating to certify emissions of GHGs. Since GHGs were not previously subject to permitting requirements, sources will have the opportunity to evaluate potential to emit GHGs and certify emissions, if necessary. These sources will have 90 days after EPA's final action approving the amendments concurrently proposed for Chapter 122, Federal Operating Permits, Potential to Emit, to certify emissions of GHGs to avoid applicability of Title V permitting. New sources of GHGs would be required to certify emissions no later than the date of operation. The commission invites comments regarding the timing allotted for certifying emissions of GHGs.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency and for some other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules would permit air emissions of GHGs under the PSD program.

The proposed rules would implement provisions in HB 788, 83rd Legislature, 2013, to

establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas, consistent with federal law. The proposed changes to Chapter 116 are part of a concurrent rulemaking that involves changes to other TAC chapters intended to implement HB 788. Other chapters in the rulemaking include Chapters 39, 55, 101, 106, and 122. Fiscal notes for proposed revisions to those chapters are provided separately.

The proposed rules establish that GHGs is a federally regulated NSR pollutant which can be subject to PSD permitting and that owners or operators of major sources with emissions of GHGs will be subject to PSD permitting requirements. The proposed rules would provide GHG emission thresholds for new sources and modifications in order to determine when PSD permits will be required.

The proposed rules also contain provisions for the transfer of applications from EPA to TCEQ.

A proposed change to §116.610(b) will allow a facility or project that triggers the requirement for a PSD permit as a result of emissions of GHGs to still use a standard permit to authorize their other minor emissions, to the extent allowed under federal PSD regulations. A change to §116.611(b) specifies that projects which are using a standard permit to authorize non-GHGs cannot begin construction until after the PSD permit for their emissions of GHGs is issued.

Other, minor changes to Chapter 116 clarify the statewide applicability of PSD permitting, and provide instructions on how emissions of GHGs are to be calculated.

PSD fee permit revenue is deposited into the Clean Air Account 0151 and is calculated based on 1% of the capital cost of the project with a minimum assessed fee of $3,000 and maximum of $75,000. Agency staff estimates that the implementation of the new rules will result in approximately 400 additional PSD permit applications over the five-year period covered by the fiscal note. Very few additional PSD permit applications are expected to be processed in Fiscal Year 2014 as the new rule is not expected to be in effect and SIP-approved until late in the fiscal year. However, beginning in Fiscal Year 2015, approximately 100 additional PSD permit applications each fiscal year are expected to be received and processed. This fiscal note assumes that of the 100 new major PSD GHG permit applications each year, an estimated 70% would have previously qualified for a Permit By Rule (PBR) or a Standard Permit (SP). It is further assumed that for this 70% or an estimated 70 permit applications per year, most of these would fall in the lower end of the PSD fee scale, which for the purposes of this fiscal note is estimated to be $20,000. Therefore, given the fee increase for 70 permit applications that would go from a PBR or SP to a PSD permit, the agency could see an increase in PSD fee revenue of $1,368,500 each year (assuming $20,000 fee for PSD less $450 PBR fee x 70 projects/year = $1,368,500/year). The other 30% of the 100 additional PSD permit

applications expected each year would be those sites that are expected to change from a minor NSR permit to a PSD permit. The anticipated fee increase for the other 30 projects (30% of 100) that went from case-by-case minor NSR to PSD is estimated to result in a $27,288 fee increase for each permit application. This change in permit type is expected to result in an additional $818,640 each year ($27,288 fee increase x 30 permit applications each year). The total estimated increase in PSD fee revenue is anticipated to be $2,187,140 each year. However, it must be pointed out that the level of additional fee revenue to be collected would depend upon the number of additional PSD applications received and the capital cost of each project involved, both of which are highly variable and difficult to predict. Any additional revenue would be used to support PSD permitting activities.

All PSD permits, including PSD permits for GHGs, require public notice as part of the permit application process. Costs may be associated with these public notice requirements. The costs for public notice associated with PSD GHG permits are not significantly different from the costs of public notice for PSD permits for non-GHG pollutants.

State agencies that operate devices such as boilers or incinerators that are stationary sources of GHG of sufficient size may require a PSD permit. Local governments that own or operate sites of an industrial or heavy commercial nature, such as power generating

stations and landfills would also be affected. Some of these sites already have PSD permits due to major emissions of other pollutants. Agency staff does not have sufficient information to determine how many state agencies may be affected by the proposed rules, but based upon information that is available, it is roughly estimated that 60 local government facilities could be affected (or 15% of the estimated 400 PSD permits anticipated to be affected by the proposed rules). This estimate would result in approximately 15 new governmental permit applications each year (very few if any applications in the first year, but 15 applications for each subsequent year).

Owners or operators of new or modified facilities with emissions of GHGs that meet or exceed defined threshold levels would be required to obtain a PSD permit, and pay the PSD permit fee, and comply with Emissions Inventory (EI) requirements under §101.10. Costs for each facility to implement and conduct the EI each year are estimated to be $3,000. It is estimated that each of the 60 new governmental permits would have an incremental cost on average of $21,871. Total costs for the estimated 270 local government facilities for the first five years the proposed rules are in effect are estimated to be $1,762,260. This figure consists of $450,000 in cumulative costs for conducting emissions inventories, and $1,312,260 in cumulative permit fees. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the continued protection of the public health and safety through the implementation of an efficient and effective state permit review process, while maintaining compliance with state and federal law.

The proposed rules will have a fiscal impact on businesses that own or operate new or modified facilities with emissions of GHGs that meet or exceed defined threshold levels. The proposed rules are not anticipated to have direct fiscal implications for individuals unless they own or operate affected facilities. Any business or industry with new or modified stationary sources which have emissions of GHGs in quantities that meet or exceed certain threshold levels must obtain a PSD permit, pay a permit fee, and comply with EI requirements. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ. However, PSD permit requirements themselves are not expected to be burdensome as best available control technology for GHGs generally does not require add-on controls, and sources are likely already equipped with sufficient monitoring technology to determine their emissions of GHGs (which are generally based on fuel consumption).

Staff estimates that approximately 100 owners and operators of major sources of GHG will be required to submit PSD GHG permit applications each year for at least four of the five years covered by this fiscal note. Of these 100 new applications expected to be submitted each year, approximately 85 (or 85%) are estimated to be commercial or industrial and come from businesses (non-governmental). These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but may also be in other types of industries. Owners and operators required to obtain a PSD permit will be required to pay a PSD permit fee, and comply with EI requirements. Very few applications are expected in the first year, as the rules either will not have been approved by EPA, or will have been approved by EPA for only a short time. For the estimated 85 commercial or industrial permit applications each year, the total estimated costs over the first five years the proposed rules would be in effect is estimated to be $1,859,035 each year. The cumulative total fee increase over the first five years the proposed rules would be in effect is estimated to be $7,436,140. This estimate comes out to approximately $21,871 in incremental permit application fees for each application. Costs for each facility to implement and conduct the EI each year are estimated to be $3,000. Total cumulative EI costs for an estimated 85 facilities over the first five years the proposed rules would be in effect would be $2,550,000. The EI costs increase year-by-year because it is an ongoing requirement and the number of sources subject to the EI requirement is increasing.

There is substantial uncertainty as to the actual number of permits that would be needed for these sites, and the fee varies widely with project specifics, so this estimate is highly speculative. Permitting costs are not expected to continue at the 85 site per year level after the first five years the proposed rules are in effect.

Small Business and Micro-Business Assessment

Adverse fiscal implications are anticipated for small or micro-businesses for the first five-year period the proposed rules are in effect. Any business or industry with new or modified stationary sources with emissions of GHGs in quantities that meet or exceed certain threshold levels must obtain a PSD permit, pay a permit fee and comply with EI requirements. Under current federal regulations these sources are already required to get the PSD permit from EPA. It is also not known if permitting costs would be more or less through EPA or the TCEQ. The GHG thresholds set by EPA trigger PSD applicability at some small facilities which previously were not subject to the requirement to get a PSD permit. There is not enough data on emissions of GHGs from small businesses to predict how many will be affected with a high degree of accuracy. Staff estimates that approximately 40 small business sites would be affected by the PSD requirements, but the number could be substantially higher. These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but may also be in other types of industries. The one-time incremental cost for the PSD permit is estimated to be approximately $21,871 for each small or micro-business permit

application. Total permitting costs for an estimated 10 small business sites for each year of the five-year period would be $218,710/year, or $874,840 in total for the five-year period. This assumes very few applications in the first year, with the remaining applications coming in over the last four years. Total cumulative EI costs for an estimated 40 small businesses over the first five years the proposed rules are in effect would be $300,000. The EI costs increase year-by-year because it is an ongoing requirement and the number of sources subject to the EI requirement is increasing.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required by state and federal law and therefore are consistent with the health, safety, or environmental and economic welfare of the state.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions to Chapter 116 is to add six GHGs to the pollutants regulated under the commission's PSD permitting program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final PSD and Title V GHG Tailoring Rule in the June 3, 2010, issue of the *Federal Register* (75 FR 31514).

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government, §2001.0225(a). Texas Government, §2001.0225, applies only to a major environmental

rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO_2e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This

conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the proposed rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permit from EPA and the proposed rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue,

960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions GHGs in Texas and to do so

consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO_2e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The proposed rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act and the TWC)), which are cited in the Statutory Authority section of this preamble. Further, the proposed rules do not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a

manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, proposed amendments to Chapter 116 would add the following terms to nonattainment and PSD definitions: GHGs, and CO_2e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and

values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules amend and update rules that govern the applicability of the PSD program to major sources of GHG emissions. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Prevention of Significant Deterioration is an applicable requirement under Chapter 122, Federal Operating Permits. This rulemaking affects the issuance or amendment of a PSD permit for major GHG sources, and therefore would result in new or revised federal operating permits for those sources.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5,

2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512)

239-5868.

SUBCHAPTER A: DEFINITIONS

§116.12

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for

construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515,

382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. [The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas.] In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating

whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding

either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate

information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or

operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such

activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Carbon dioxide equivalent (CO_2e) emissions--shall represent

(A) an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98, Subpart A, Table A-1 – Global Warming Potentials, and summing the resultant values.

(B) for purposes of this paragraph, prior to July 21, 2014, the mass of the GHG carbon dioxide (CO_2) shall not include CO_2 emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

(8) [(7)] Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(9) [(8)] Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(10) [(9)] Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(11) [(10)] Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(12) [(11)] Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(13) [(12)] De minimis threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(14) [(13)] Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(15) [(14)] Federally regulated new source review pollutant--As defined in subparagraphs (A) - (E) [(D)] of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; [or]

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108; or [.]

(E) greenhouse gases that meet or exceed the thresholds established in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(16) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).

(17) [(15)] Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(18) [(16)] Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(19) [(17)] Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). For greenhouse gases, the major source thresholds are specified in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it

is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(20) [(18)] Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively and in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

Figure: 30 TAC §116.12(20)(A)

[Figure: 30 TAC §116.12(18)(A)]

TABLE I

MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT designation[1]	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_X)[3]	100	40	1.10 to 1
I marginal	100	40	1.15 to 1
II moderate	50	25	1.20 to 1
III serious	25	25	1.30 to 1
IV severe			
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations as defined in §101.1[(70)] of this title (relating to Definitions).

[2] The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_X and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

[3] VOC and NO_X are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

[4] The offset ratio is specified to be greater than 1.00 to 1.
VOC = volatile organic compounds
NO_X = oxides of nitrogen
NO_2 = nitrogen dioxide
CO = carbon monoxide

SO_2 = sulfur dioxide
PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the National Ambient Air Quality Standard [NAAQS] for [nitrogen dioxide (]NO_2[)].

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(21) [(19)] Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(22) [(20)] Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(23) [(21)] Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(24) [(22)] Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(25) [(23)] Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit.

(26) [(24)] Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(27) [(25)] Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(28) [(26)] Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(29) [(27)] Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally

enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(30) [(28)] Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(31) [(29)] Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and

fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(32) [(30)] Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(33) [(31)] Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(34) [(32)] Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(35) [(33)] Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(36) [(34)] Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(37) [(35)] Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq*.

(38) [(36)] Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§116.111

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air

contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515,

382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under Title I Part C of the Federal Clean Air Act (FCAA) shall evaluate and apply BACT as defined in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements).

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed

under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA) under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR Part 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review.

(i) If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(ii) If the proposed facility or modification meets or exceeds the applicable greenhouse gases thresholds defined in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources) then it shall comply with all applicable requirements in this chapter concerning PSD review for sources of greenhouse gases.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results

predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 6: PREVENTIONOF SIGNIFICANT DETERIORATION REVIEW

§§116.160, 116.164, 116.169

Statutory Authority

The amendments and new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments and new sections are also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions, which defines certain terms used in the Chapter 382; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control

of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05101 concerning De Minimis Air Contaminants, which authorizes the commission to develop by rule criteria to establish a de minimis level of air contaminants below which a permit, standard permit or permit by rule is not required; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments and new sections are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan

revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed new and amended sections implement House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.05101, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§116.160. Prevention of Significant Deterioration Requirements.

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the requirements of this section. In addition, each proposed new major source of greenhouse gases (GHGs) or major modification involving GHGs shall comply with the applicable requirements of this section. The owner or operator of a proposed new or modified facility that will be a new major stationary source for the prevention of significant deterioration air contaminant shall meet the additional requirements of subsection (c)(1) - (4) of this section.

(b) [The de] De minimis threshold test (netting):

(1) is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23); and [.]

(2) is required for GHGs at existing major sources if the proposed modification results in an emissions increase, without regard to decreases, as required in §116.164(a)(2) and (4)(B) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(c) In applying the de minimis threshold test (netting), if the net emissions increases are greater than the major modification levels for the pollutant identified in 40 CFR §52.21(b)(23) and for GHGs in §116.164 of this title, the following requirements apply.

(1) In addition to those definitions in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA)

in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference:

(A) 40 CFR §52.21(b)(12) - (15), concerning best available control technology, baseline concentrations, dates, and areas;

(B) 40 CFR §52.21(b)(19), concerning innovative control technology; and

(C) 40 CFR §52.21(b)(24) - (28), concerning federal land manager, terrain, and Indian reservations/governing bodies.

(2) The following requirements from prevention of significant deterioration of air quality regulations promulgated by the EPA in 40 CFR §52.21 are hereby incorporated by reference:

(A) 40 CFR §52.21(c) - (k), concerning increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, exemptions, control technology review, and source impact analysis;

(B) 40 CFR §52.21(m) - (p), concerning air quality analysis, source information, additional impact analysis, and sources impacting federal Class I areas;

(C) 40 CFR §52.21(r)(4), concerning relaxation of an enforceable limitation; and

(D) 40 CFR §52.21(v), concerning innovative technology.

(3) The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR.

(4) The term "executive director" shall replace the word "administrator" in the referenced sections of the CFR except in 40 CFR §52.21(g) and (v).

(d) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a

generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.

§116.164. Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.

(a) Greenhouse Gases (GHGs) are subject to Prevention of Significant Deterioration review under the following conditions:

(1) New source, major for non-GHGs. The stationary source is a new major stationary source for a federally regulated new source review (NSR) pollutant that is not GHGs, and will emit or have the potential to emit 75,000 tons per year (tpy) or more carbon dioxide equivalent (CO_2e); or

(2) Existing source, major for non-GHGs. The stationary source is an existing major stationary source for a federally regulated NSR pollutant that is not GHGs, and will have a significant net emissions increase of a federally regulated NSR pollutant that is not GHGs, and a net emissions increase greater than zero tpy GHGs on a mass basis and 75,000 tpy or more CO_2e.

(3) New source, major for GHGs Only. The new stationary source that will emit or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 Code of Federal Regulations (CFR) §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO_2e.

(4) GHGs major modification at an existing major source.

(A) The existing stationary source emits or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO_2e; and

(B) the stationary source undertakes a physical change or change in the method of operation that will result in a net emissions increase greater than zero tpy GHGs on a mass basis, and a net emissions increase of 75,000 tpy or more CO_2e.

(5) Existing source that is not major. The existing stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase greater than or equal to 100 tpy GHGs on a mass basis, if the source is

listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO_2e.

(b) New stationary souces with emissions of GHGs, or existing stationary sources that undertake a physical change or change in the method of operations that includes emissions of GHGs, that do not meet any of the conditions in subsection (a) of this section do not require authorization under this subchapter, Subchapter F (relating to Standard Permits), Subchapter G (relating to Flexible Permits), and Chapter 106 (relating to Permits By Rule) for emissions of GHGs. Owners or operators of these sources must keep records sufficient to demonstrate the amount of emissions from the source. Records must be made available at the request of personnel from the commission or any local air pollution control agency having jurisdiction.

§116.169. Greenhouse Gases (GHGs) Application Transition.

Upon the effective date of the United States Environmental Protection Agency (EPA) approval of this chapter and rescission of the Federal Implementation Plan as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178), the commission will accept transfer of and review applications previously filed with EPA for greenhouse gas prevention of significant deterioration permits. These applications will be subject to the applicable requirements of this chapter.

SUBCHAPTER F: STANDARD PERMITS

§116.610

Statutory Authority

The amendment is and new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is are also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may

emit air contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs; and THSC, §382.05195 concerning Standard Permits, which authorizes the commission to issue standard permits for new or existing similar facilities. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements House Bill 788, 82rd Legislature, 2013, THSC,

§§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518 and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq*.

§116.610. Applicability.

(a) Under the Texas Clean Air Act, §382.051, a project that meets the requirements for a standard permit listed in this subchapter or issued by the commission is hereby entitled to the standard permit, provided the following conditions listed in this section are met. For the purposes of this subchapter, project means the construction or modification of a facility or a group of facilities submitted under the same registration.

(1) Any project that results in a net increase in emissions of air contaminants from the project other than [carbon dioxide,] water, nitrogen, [methane,] ethane, hydrogen, oxygen, or greenhouse gases (GHGs) as defined in §101.1 of this title (relating to Definitions), or those for which a national ambient air quality standard has been established must meet the emission limitations of §106.261 of this title (relating to Facilities (Emission Limitations)), unless otherwise specified by a particular standard permit.

(2) Construction or operation of the project must be commenced prior to the effective date of a revision to this subchapter under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project must comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (concerning New Source Performance Standards) as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA).

(4) The proposed project must comply with the applicable provisions of FCAA, §112 (concerning Hazardous Air Pollutants) as listed under 40 CFR Part 61, promulgated by the EPA.

(5) The proposed project must comply with the applicable maximum achievable control technology standards as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR Part 63)).

(6) If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(b) Any project that constitutes a new major stationary source or major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) because of emissions of air contaminants other than greenhouse gases is subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter. A new major stationary source or major modification which is subject to Chapter 116, Subchapter B, Division 6 (relating to Prevention of Significant Deterioration Review) due solely to emissions of greenhouse gases may use a standard permit under this chapter for air contaminants that are not greenhouse gases.

(c) Persons may not circumvent by artificial limitations the requirements of §116.110 of this title.

(d) Any project involving a proposed affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40

CFR Part 63)). Affected sources subject to Subchapter E of this chapter may use a standard permit under this subchapter only if the terms and conditions of the specific standard permit meet the requirements of Subchapter E of this chapter.

§116.611. Registration to Use a Standard Permit.

(a) If required, registration to use a standard permit shall be sent by certified mail, return receipt requested, or hand delivered to the executive director, the appropriate commission regional office, and any local air pollution program with jurisdiction, before a standard permit can be used. The registration must be submitted on the required form and must document compliance with the requirements of this section, including, but not limited to:

(1) the basis of emission estimates;

(2) quantification of all emission increases and decreases associated with the project being registered;

(3) sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability);

(4) information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project;

(5) a description of the project and related process; and

(6) a description of any equipment being installed.

(b) Construction may begin any time after receipt of written notification from the executive director that there are no objections or 45 days after receipt by the executive director of the registration, whichever occurs first, except where a different time period is specified for a particular standard permit or the source obtains a prevention of significant deterioration permit for greenhouse gases as provided in §116.164(a) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(c) In order to avoid applicability of Chapter 122 of this title (relating to Federal Operating Permits), a certified registration shall be submitted. The certified registration must state the maximum allowable emission rates and must include documentation of the basis of emission estimates and a written statement by the registrant certifying that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be amended if the basis of the emission estimates changes or the maximum emission rates listed on the

registration no longer reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site. Certified registrations must also be maintained in accordance with the requirements of §116.115 of this title (relating to General and Special Conditions).

(1) Certified registrations established prior to December 11, 2002, [the effective date of this rule] shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after December 11, 2002, [the effective date of this rule] shall be submitted no later than the date of operation.

(3) Certified registrations established for greenhouse gases (as defined in §101.1 of title) on or after the effective date of EPA's final action approving amendments to §122.122 of this title (relating to Potential to Emit) into the State Implementation Plan:

(A) for existing sites that emit or have the potential to emit greenhouse gases, no later than 90 days after the effective date of EPA's final action on §122.122 of this title; or

(B) for new sites that emit or have the potential to emit greenhouse gases, no later than the date of operation.

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§122.10, 122.122 and 122.130.

If adopted, the commission will submit §122.122 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs 0n December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The

standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHGs control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO_2), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined

the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because the Texas SIP did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to

submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for

all non-GHG pollutants).

Although Texas has an EPA-approved Title V operating permit program, it currently lacks the approval to permit sources that are major sources subject to Title V as a result of their emissions of GHG. In EPA's "Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule," as published in the December, 30, 2010, issue of the *Federal Register* (75 FR 82254), EPA stated in footnote 8 that in this situation, there is no obligation for these major GHG sources to apply for a Title V permit until such time as the state amends its rules to make the permit program applicable to them.

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs and consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to

EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law. The amendments to §§122.10, 122.122 and 122.130 will be submitted to EPA for approval as revisions to Texas' Federal Operating Permits Program.

The commission is initiating this rulemaking to fulfill the directive from the Legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}.

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this proposal, the commission is proposing new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), and 116 (Control of Air Pollution by Permits for New Construction or

Modification) to implement HB 788. Except where specifically noted, all proposed changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Section by Section Discussion

§122.10, Definitions

The commission proposes to amend §122.10 by modifying the definition of air pollutant to include the pollutant GHGs, amend the definition of applicable requirement, add the definition of carbon dioxide equivalent (CO_2e) emissions, and amend the definition of major source. The commission also proposes non-substantive amendments to correct errors and appropriately renumber paragraphs.

The commission proposes to amend the definition of "Air pollutant" in §122.10(1) to include the pollutant GHGs. The proposed definition of GHGs establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: CO_2, nitrous oxide (N_2O), methane (CH_4), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). This proposed definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are commonly considered GHGs are not

included in the definition of the pollutant GHGs.

The definition of "Applicable requirement" in §122.10(2)(I)(xi) is proposed to be amended to add EPA-issued PSD permits to the list of federal requirements applicable to a site. Federal operating permits must include all state and federal air quality related requirements applicable to the particular site covered by the permit. This addition is necessary to incorporate EPA-issued GHG permits in operating permits as applicable requirements, as these are not currently included in the definition.

The proposed definition of CO_2e emissions in §122.10(3) is consistent with EPA's definition in 40 CFR §51.166(b)(48). The new definition is necessary to establish the threshold for sites to be considered major for GHGs, consistent with EPA's Tailoring Rule. The CO_2e emissions are determined by multiplying the mass amount (in tons per year (tpy)) of emissions of each of the gases (that are included in the definition of the pollutant GHGs) by the global warming potential (GWP) of the gas, and adding the results. The GWPs are published in the 40 CFR Part 98, Subpart A, Table A-1 – Global Warming Potentials. For example, a site has the potential to emit 5 tpy CO_2, 25 tpy of CH_4, and 10 tpy of the hydrofluorcarbon trifluoromethane (CHF_3). The GWP of CO_2e is 1, the GWP of CH_4 is 21, and the GWP of CHF_3 is 11,700. The CO_2e emissions of the source would be 117,530 tpy CO_2e. This value is reached by multiplying 5 tpy CO_2 times 1, 25 tpy CH_4 by 21, and 10 tpy CHF3 by 11,700; then adding each result to total 117,530

tpy CO_2e.

The proposed definition of CO_2e emissions includes EPA's deferral for CO_2 emissions from bioenergy and other biogenic sources as published in the July 20, 2011, issue of the *Federal Register* (76 FR 43490). This deferral established that biogenic CO_2 emissions are not required to be counted for applicability purposes under the PSD program and the Title V program until July 21, 2014. EPA committed to conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources during the deferral period. In the meantime, certain CO_2 emissions from the combustion or decomposition of non-fossilized and biodegradable organic material are not required to be included in the total mass of CO_2 used to determine CO_2e emissions. For example, CO_2 generated from the combustion of biogas collected from (or the biological decomposition of) waste in landfills, wastewater treatment, or manure management processes is not required to be included in the calculation of CO_2e emissions. Also exempted is CO_2 generated from the following: fermentation during ethanol production; combustion of the biological fraction of municipal solid waste or biosolids; combustion of the biological fraction of tire-derived fuel; and combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material. Additional information regarding the deferral for biogenic sources is available on EPA's Web site *http://www.epa.gov/climatechange/ghgemissions/biogenic-emissions.html.*

The commission proposes to amend the definition of major source in §122.10(14) to establish the specific Title V permitting major source thresholds for emissions of GHGs. The major source thresholds for Title V sources are contained in proposed subparagraph (H) and referenced in subparagraph (C). Consistent with EPA's Tailoring Rule, sites that emit or have the potential to emit GHGs must evaluate both their emissions of GHGs on a mass basis and as CO_2e emissions to determine Title V applicability. To evaluate the mass basis element of applicability, the potential emissions (in tpy) of each of the six GHGs would be added together. If the total meets or exceeds 100 tpy, the CO_2e emissions total must also be calculated to determine Title V applicability. The potential emissions of each of the six GHGs would be multiplied by its respective GWP, and the results would be added together. If the total is greater than or equal to 100,000 tpy CO_2e, the site would be subject to the Title V permitting program. If either one of the thresholds is not met or exceeded, the site is not subject to the Title V permitting program. For example, a site emits or has the potential to emit 10,000 tpy CO_2 and 3,500 tpy CH_4. The total emissions of GHGs on a mass basis exceed 100 tpy GHGs, so the CO_2e emissions must be calculated. The GWP of CO_2 is one and the GWP of CH_4 is 21. Multiply 10,000 tpy CO_2 by the GWP of 1, multiply 3,500 tpy CH_4 by the GWP of 21, and add the two results to get 83,500 tpy CO_2e. This site would not be subject to the Title V permitting program, because both thresholds were not exceeded.

In another example, a site emits or has the potential to emit 20,000 tpy CO_2 and 4,500 tpy CH_4. This site would be a major source and subject to the Title V permitting program because the 24,500 tpy GHGs on a mass basis is equal to or greater than 100 tpy GHGs, and the 114,500 CO_2e emissions are greater than 100,000 tpy CO_2e. To get this result, multiply 20,000 tpy CO_2 by the GWP of 1, multiply 4,500 tpy CH_4 by the GWP of 21, and add the two results to get 114,500 tpy CO_2e.

The commission proposes to amend §122.10(2)(F)(iii) and (J)(vii) to correct the title of referenced sections.

§122.122, Potential to Emit

The commission proposes to amend §122.122(e) to clarify that existing sites may certify emissions below major source thresholds. Since the pollutant GHGs is being added to the Title V (and PSD) permitting program, sites with sources of GHGs which are currently operating may have the potential to emit over the major source thresholds, but actual emissions may be below the thresholds. These sites will have 90 days after EPA's final action approving amendments to §122.122 into the SIP to certify emissions of GHGs in order to avoid applicability of Title V permitting. Sites with new sources of GHGs would be required to certify emissions no later than the date of operation. The commission invites comments regarding the timing allotted for certifying emissions of GHGs.

Subsection (e)(1) and (2) was updated to reflect the current requirements and reference the specific date those provisions were effective.

§122.130, Initial Application Due Dates

The commission proposed subsection (b)(3) to establish the deadline for sources that are subject to Title V permitting to submit an application. If a source becomes subject to the Title V program for the first time because of emissions of GHGs, owners or operators will have to submit an abbreviated application no later than 12 months after either EPA's final action approving the amendments to Chapter 122, or EPA's final action approving amended §122.122 in to the SIP, whichever action occurs later in time.

The commission proposes nonsubstantive amendments to §122.130(c) to expand the acronym for Code of Federal Regulations.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency and, for some other units of state or local government as a result of administration or enforcement of the proposed rules. Sites owned or operated by units of state or local government with major air emissions

of GHGs may become subject to Title V federal operating permit requirements and subject to paying emissions fees.

The proposed rules would implement provisions in HB 788, 83rd Legislature, 2013, to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas, consistent with federal law. The proposed changes to Chapter 122 are part of a concurrent rulemaking that involves changes to other TAC chapters intended to implement HB 788. Other chapters in the rulemaking include Chapters 39, 55, 101, 106, and 116. Fiscal notes for proposed revisions to those chapters will be provided separately.

HB 788 requires that TCEQ adopt rules to allow for permitting of emissions of GHGs, under the PSD and Federal Operating Permits (Title V) programs.

The proposed changes to Chapter 122 rules will require sites with major emissions of GHGs to become subject to Title V federal operating permit requirements. The proposed changes revise the definition of "Air pollutant" under §122.10(1)(G) so that GHGs will now be covered as a pollutant subject to federal operating permit requirements. The proposed changes also revise the §122.10(14) definition of "Major source" to set a 100,000 tpy CO_2e threshold for sites which will be required to obtain a Title V permit. (Sites must also exceed 100 tpy of GHG on a mass basis to become a

major source.) A definition of "Carbon dioxide equivalent (CO_2e) emissions" is also added to §122.10(3) to specify how that value is calculated.

It is anticipated that as a result of these proposed rules, TCEQ will have to review Title V permit applications for the large number (estimated to be approximately 1,800 over the first five years the proposed rules are in effect) of additional sites that will now be subject to Title V federal operating permits due to emissions of GHGs. Additional resources also will be required to support enforcement and compliance with these permits.

The agency is required by federal law to assess and collect fees sufficient enough to support the Title V permitting program. It is anticipated that increased emissions fee revenue will be sufficient to cover the costs of implementing the Title V operating permit program. Although there is not a direct fee assessed on emissions of GHGs, the rule changes will cause a substantial number of additional sites to become subject to the §101.27 emissions fee rule, which will require them to pay fees on their emission of non-GHGs pollutants. Estimated revenue to Account 5094 Operating Permit Fees is estimated to be $76,460 in Fiscal Year 2014, $886,722 in Fiscal Year 2015, and increase up to $3,049,989 in Fiscal Year 2018.

The Legislature appropriated TCEQ $58,680 in Fiscal Year 2014 and $726,682 in Fiscal

Year 2015 out of Operating Permit Fees Account 5094 to implement HB 788. The agency was also granted authority for one additional full time equivalent (FTE) position in Fiscal Year 2014 and ten FTEs in Fiscal Year 2015. Starting in Fiscal Year 2016, it is anticipated that the TCEQ would need to add nine additional FTEs to perform compliance investigations for GHG Title V permits, process and issue GHG Title V permits, perform emissions inventories, load emissions data, enhance reporting tools, assess emission fees, provide reporting assistance, review inventories, and audit fee data. Starting in Fiscal Year 2017, the TCEQ would need to add an estimated ten additional FTEs to perform compliance investigations for GHG Title V permits, supervise the additional regional investigators, perform emission inventory activities, and process enforcement cases. Starting in Fiscal Year 2018, the TCEQ would need to add an estimated ten additional FTEs to perform compliance investigations for GHG Title V permits, supervise the additional regional investigators, perform emissions inventory activities, and process enforcement cases. The agency will need a total of 39 FTEs as of Fiscal Year 2018 to implement HB 788.

State agencies which operate a stationary source of emissions of GHGs of sufficient size may require a Title V permit, and thus may become subject to emission fees. Agencies may have boilers, incinerators, or other equipment that could be subject to Title V requirements because of emissions of GHGs. Agency staff does not have enough information to know how many state agencies could be affected. Some units of local

government operate stationary sources of GHGs of sufficient size to be affected and would include sites of an industrial or commercial nature, such as power generating stations and landfills. Sites with CO_2e emissions meeting or exceeding 100,000 tpy (and 100 tpy GHGs on a mass basis) would be required to obtain a Title V permit, and would become subject to emission fees for their non-GHG emissions. Some of these sites will already have a Title V permit and already be subject to fees due to major emissions of other pollutants. Based on available information, staff estimate approximately 270 local government sites could be affected for the five-year period after the rules are implemented (270 sites would be 15% of the 1,800 total sites estimated to be affected).

Assuming 15% of the total new emissions fee revenue comes from units of local government, it is estimated that costs to units of government who own or operate affected sites would be $11,469 in Fiscal Year 2014, $470,516 in Fiscal Year 2015, $571,201 in Fiscal Year 2016, $684,549 in Fiscal Year 2017, and $794,998 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 270 sites will be permitted each year, then total permit application costs for local governments each year are estimated to be $337,500. Total annual emissions fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $808,016 in Fiscal Year 2015, $908,701 in Fiscal Year 2016, $1,022,049 in Fiscal Year 2017, and

$1,132,498 in Fiscal Year 2018.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the continued protection of the public health and safety through the implementation of an efficient and effective state GHGs Title V permitting process, while maintaining compliance with state and federal law.

The proposed rules will have a fiscal impact on businesses that own or operate a site which has stationary sources which emit GHGs in quantities that meet or exceed 100,000 tpy CO2e. The proposed rules are not anticipated to have direct fiscal implications for individuals unless they own or operate affected facilities. In order to comply, affected businesses will be required to obtain a Title V federal operating permit and pay emission fees.

Staff estimates that approximately 1,530 (about 85% of the total estimated 1,800 affected sites) industrial sites will be affected by the proposed rule changes. These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but also may include other types of industries.

Assuming 85% of the total new emission fee revenue comes from business and industry, it is estimated that emission fee costs to businesses that own or operate affected sites would be $64,991 in Fiscal Year 2014, $753,756 in Fiscal Year 2015, $1,324,306 in Fiscal Year 2016, $1,966,611 in Fiscal Year 2017, and $2,592,490 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 1,530 sites will be permitted each year, then total permit application costs each year are estimated to be $1,912,500. Total annual emission fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $2,666,256 in Fiscal Year 2015, $3,236,806 in Fiscal Year 2016, $3,879,111 in Fiscal Year 2017, and $4,504,990 in Fiscal Year 2018.

Small Business and Micro-Business Assessment

Adverse fiscal implications are anticipated for small or micro-businesses for the first five year period the proposed rules are in effect. The proposed rules will have a fiscal impact on small or micro-businesses that own or operate a site which has stationary sources which emit GHGs in quantities that meet or exceed 100,000 tpy CO2e. In order to comply, affected businesses will be required to obtain a Title V federal operating permit and pay emissions fees. There is not enough data on emissions of GHGs from small businesses to predict how many will be affected with a high degree of accuracy. Staff estimates that at least 150 (about 10% of the total 1,530 affected sites owned by

business) small business sites could be affected by the proposed requirements, at a minimum, but the number could be substantially higher. These sites are likely to be in the oil and gas industry, petrochemical industry, electric utilities, and general manufacturing, but may also be in other types of industries.

If 10% of the total new emission fee revenue from business and industry comes from small or micro-businesses, it is estimated then that emission fee costs to businesses that own or operate affected sites would be $6,499 in Fiscal Year 2014, $75,375 in Fiscal Year 2015, $132,430 in Fiscal Year 2016, $196,661 in Fiscal Year 2017, and $259,249 in Fiscal Year 2018. A typical Title V application for these additional GHGs Title V sites is estimated to cost the applicant $5,000 to develop and produce the application. Assuming that GHGs Title V permitting begins in Fiscal Year 2015, and one fourth of the projected 150 sites will be permitted each year, then total permit application costs each year are estimated to be $187,500. Total annual emission fee costs and application costs beginning in Fiscal Year 2015 are estimated to be $262,875 in Fiscal Year 2015, $319,930 in Fiscal Year 2016, $384,161 in Fiscal Year 2017, and $446,749 in Fiscal Year 2018.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are

required by state and federal law and therefore are consistent with the health, safety, or environmental and economic welfare of the state.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions to Chapter 122

is to implement relevant provisions of HB 788 to add six GHGs to the pollutants subject to the Operating Permits program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule in the June 3, 2010, issue of the *Federal Register* (75 FR 31514).

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include

programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Title V of the FCAA (42 USC, §§7661 - 7661e) requires each state to adopt and implement an operating permits program consistent with EPA regulations. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the Title V permitting authority for major sources of emissions of GHGs in Texas and will do so consistent with federal law governing this program. Specifically, the proposed amendments to Chapter 122 would add six GHGs to the pollutants subject to the Operating Permits program and establish the emissions thresholds for applicability of the program consistent with federal requirements in the Tailoring Rule, and to ensure that relevant sections of Chapter 122 can be a federally approved part of the Texas SIP.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an

assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, the proposed rules fall under the exception in Texas

Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA

against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules do not exceed an express requirement in federal or state law. This rulemaking implements relevant provisions of THSC, §382.05102, as added by HB 788, 83rd Legislature, 2013. The proposed rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking, and are not adopted solely under the general powers of the agency but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, the proposed amendments to Chapter 122 would add six GHGs to the pollutants subject to the Federal Operating Permits program and to establish the emissions thresholds for applicability of

the program consistent with federal requirements in the Tailoring Rule.

The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.)*, and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the

applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules amend and update rules that govern the applicability of the Title V program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

This proposal impacts owners and operators of sites subject to the Texas Operating Permits Program (Title V) requiring applications for or revisions to operating permits. The proposal would also create new Title V sources subject to the program for only emissions of GHGs.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 5, 2013, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-040-116-AI. The comment period closes December 9, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Tasha Burns, Operational Support, Air Permits Division at (512) 239-5868.

SUBCHAPTER A: DEFINITIONS

§122.10

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating

Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to EPA that implement the requirements of the Title V program.

The proposed amendment implements House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a national ambient air quality standard has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement.

(G) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Ports [Reports]) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities),

§§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain or Clean Air Interstate Rule Programs;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; [and]

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(xi) any FCAA, Title I, Part C (relating to Prevention of Significant Deterioration) permit issued by EPA; and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surfaces with [Surface] Coatings Containing Less Than [containing less than] 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Carbon dioxide equivalent (CO_2e) emissions--shall represent

(A) an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98,

Subpart A, Table A-1 – Global Warming Potentials, and summing the resultant values.

(B)For purposes of this paragraph, prior to July 21, 2014, the mass of the GHG carbon dioxide (CO_2) shall not include CO_2 emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

(4) [(3)] Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(5) [(4)] Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(6) [(5)] Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(7) [(6)] Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(8) [(7)] Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(9) [(8)] Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(10) [(9)] Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(11) [(10)] Final action--Issuance or denial of the permit by the executive director.

(12) [(11)] General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(13) [(12)] Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(14) [(13)] Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant except for greenhouse gases (GHGs). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_X Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO_X) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_X in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_X in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_X in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(H) For GHGs, any site that emits or has the potential to emit 100 tpy or more of GHGs on a mass basis and 100,000 tpy carbon dioxide equivalent (CO_2e)

emissions or more. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(15) [(14)] Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(16) [(15)] Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(17) [(16)] Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(18) [(17)] Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(19) [(18)] Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(20) [(19)] Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(21) [(20)] Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air

pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(22) [(21)] Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA), §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(23) [(22)] Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(24) [(23)] Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(25) [(24)] Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(26) [(25)] Renewal--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General

Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(27) [(26)] Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(28) [(27)] Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

(29) [(28)] State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(30) [(29)] Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 2: APPLICABILITY

§122.122

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies

permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The proposed amendments implement House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.122. Potential to Emit.

(a) For purposes of determining applicability of the Federal Operating Permit Program under this chapter, the owner or operator of stationary sources without any other federally-enforceable emission rate may limit their sources' potential to emit by maintaining a certified registration of emissions, which shall be federally-enforceable. Emission rates in new source review permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and certified registrations provided for under Chapter [Chapters] 106 of this title (relating to Permits by Rule) or Chapter 116 of this title are also federally-enforceable emission rates.

(b) All representations in any registration of emissions under this section with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the stationary source shall operate. It shall be unlawful for any person to vary from such representation unless the registration is first revised.

(c) The registration of emissions shall include documentation of the basis of emission rates and a certification, in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the maximum emission rates listed on the

registration reflect the reasonably anticipated maximums for operation of the stationary source.

(d) In order to qualify for registrations of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source in §122.10 of this title (relating to General Definitions).

(e) The certified registrations of emissions shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site.

(1) Certified registrations established prior to December 11, 2002, [the effective date of this rule] shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after December 11, 2002, [the effective date of this rule] shall be submitted no later than the date of operation.

(3) Certified registrations established for greenhouse gases (GHGs) (as defined in §101.1 of this title (relating to Definitions)) on or after the effective date of the United States Environmental Protection Agency's final action approving amendments to this section shall be submitted:

(A) for existing sites that emit or have the potential to emit GHGs, no later than 90 days after the effective date of EPA's final action on this section; or

(B) for new sites that emit or have the potential to emit GHGs, no later than the date of operation.

(f) All certified registrations and records demonstrating compliance with a certified registration shall be maintained on-site and shall be provided, upon request, during regular business hours to representatives of the appropriate commission regional office and any local air pollution control agency having jurisdiction over the site. If however, the site normally operates unattended, certified registrations and records demonstrating compliance with the certified registration must be maintained at an office within Texas having day-to-day operational control of the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner.

SUBCHAPTER B: PERMIT REQUIREMENTS
DIVISION 3: PERMIT APPLICATION
§122.130

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541,

concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The proposed amendments implement House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.130. Initial Application Due Dates.

(a) Owners or operators of any site subject to the requirements of this chapter on February 1, 1998, shall submit abbreviated initial applications by February 1, 1998. The executive director shall inform the applicant in writing of the deadline for submitting the remaining application information.

(b) Owners and operators of sites identified in §122.120 of this title (relating to Applicability) that become subject to the requirements of this chapter after February 1, 1998 are subject to the following requirements.

(1) If the site is a new site or a site that will become subject to the program as the result of a change at the site, the owner or operator shall not operate the change, or the new emission units, before an abbreviated application is submitted under this chapter. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(2) If the site becomes subject to the program as the result of an action by the executive director or the United States Environmental Protection Agency (EPA) [EPA], the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter.

(3) If the site becomes subject to the program as a result of rulemaking that adds greenhouse gas sources to the Federal Operating Permits Program, the owner or operator will submit an abbreviated application no later than 12 months after EPA's final action approving either the Federal Operating Permits Program revision or the revision of §122.122 of this title (relating to Potential to Emit) into the State Implementation Plan, whichever is later.

(c) Applications submitted under 40 Code of Federal Regulations (CFR) Part [CFR] 71 (Federal Operating Permit Programs).

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

AN ACT

relating to permitting of greenhouse gas emissions by the Texas Commission on Environmental Quality; limiting the amount of a fee.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The legislature finds that in the interest of the continued vitality and economic prosperity of this state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred permitting authority for emissions of greenhouse gases.

SECTION 2. Subchapter C, Chapter 382, Health and Safety Code, is amended by adding Section 382.05102 to read as follows:

Sec. 382.05102. PERMITTING AUTHORITY OF COMMISSION; GREENHOUSE GAS EMISSIONS. (a) In this section, "greenhouse gas emissions" means emissions of:

(1) carbon dioxide;

(2) methane;

(3) nitrous oxide;

(4) hydrofluorocarbons;

(5) perfluorocarbons; and

(6) sulfur hexafluoride.

(b) To the extent that greenhouse gas emissions require authorization under federal law, the commission may authorize greenhouse gas emissions in a manner consistent with Section

382.051.

(c) The commission shall:

(1) adopt rules to implement this section, including rules specifying the procedures to transition to review by the commission any applications pending with the United States Environmental Protection Agency for approval under 40 C.F.R. Section 52.2305; and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

(d) The permit processes authorized by this section are not subject to the requirements relating to a contested case hearing under this chapter, Chapter 5, Water Code, or Subchapters C-G, Chapter 2001, Government Code.

(e) If authorization to emit greenhouse gas emissions is no longer required under federal law, the commission shall:

(1) repeal the rules adopted under Subsection (c); and

(2) prepare and submit appropriate federal program revisions to the United States Environmental Protection Agency for approval.

SECTION 3. Section 382.0621, Health and Safety Code, is amended by adding Subsection (f) to read as follows:

(f) The commission may impose fees for emissions of greenhouse gas only to the extent the fees are necessary to cover the commission's additional reasonably necessary direct costs of implementing Section 382.05102.

SECTION 4. This Act takes effect immediately if it receives

a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I certify that H.B. No. 788 was passed by the House on April 19, 2013, by the following vote: Yeas 114, Nays 23, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 788 on May 20, 2013, by the following vote: Yeas 139, Nays 5, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 788 was passed by the Senate, with amendments, on May 17, 2013, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor